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No. 3091

United States
Circuit Court of Appeals

1135

For the Ninth Circuit.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and
GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,

Appellants,

vs.

WASHOE COUNTY BANK, a Corporation, ESTATE OF W. O'H.
MARTIN, INCORPORATED, a Corporation, GEORGE M.
MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED
STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR,
A. H. MANNING and D. A. BENDER,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Nevada.

FILED
DEC 26 1917.

H. MONCKTON,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the United States District Court, in and for the
District of Nevada, 9th Judicial Circuit.*

CLARA M. WIGHT, and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY,
and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate
of W. O'H. MARTIN, Incorporated, a Cor-
poration, GEORGE W. MAPES, O. W.
WARD, F. M. ROWLAND, C. T. BENDER,
FRED STADTMULLER, RUDOLPH
HERZ, GEORGE H. TAYLOR, A. H. MAN-
NING and D. A. BENDER,
Defendants.

Amended Bill of Complaint.

To the Honorable, the Judges of the United States
District Court, in [1*] and for the District
of Nevada, 9th Judicial Circuit:

Now comes Clara M. Wight and Otis B. Wight,
her husband, citizens and residents of the State of
Oregon, and Gertrude M. Gregory and T. T. C. Greg-
ory, her husband, citizens and residents of the State
of California, with leave of Court first had and ob-
tained, file this, their amended bill against the
Washoe County Bank, a corporation organized and
existing under and by virtue of the laws of the State
of Nevada, and a citizen and resident of the State
of Nevada, and the Estate of W. O'H. Martin, In-

*Page-number appearing at foot of page of original certified Transcript
of Record.

corporated, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and a citizen and resident of the said State of Nevada and thereupon your orators complain and say:

I. That your orators, Gertrude M. Gregory and T. T. C. Gregory, are now and at all the times mentioned were husband and wife.

II. That your orators, Clara M. Wight and Otis B. Wight, are now and at all the times mentioned were husband and wife.

III. That the said defendant, Washoe County Bank, is now and at all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada.

IV. That the said defendant, Estate of W. O'H. Martin, Incorporated, is now and at all the times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Nevada.

V. That this controversy is wholly between citizens of different states in this: That the said Clara M. Wight and Otis B. Wight, her husband, are citizens and residents and inhabitants of the State of Oregon, and that plaintiffs, Gertrude M. Gregory and T. T. C. Gregory, her husband, are citizens and residents of the State of California, and that both of the said defendants, Washoe County Bank and Estate of W. O'H. Martin, Incorporated, are citizens and residents and inhabitants of the State of Nevada, in this: That both of said corporations are organized and incorporated and existing under and by virtue

of the laws of the said State of Nevada, and doing business therein; that the said defendants, George W. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herz, George H. Taylor, A. H. Manning and *A. D. Bender*, are, and each of them is, a [2] resident, citizen and inhabitant of the said State of Nevada.

VI. That your orators, Clara M. Wight and Gertrude M. Gregory, are now and for the period of about ten years last past have been the owners of two hundred shares each of the capital stock of the said defendant, Estate of W. O'H. Martin, Incorporated, and that both the said Clara M. Wight and Gertrude M. Gregory were such shareholders at all times that the transactions hereinafter alleged took place, and that this suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

VII. That the officers and managing directors of the said Estate of W. O'H. Martin, Incorporated, are Louise W. Martin, the president thereof, Anna H. Martin, Margaret S. Martin and Edward Barber, the other directors thereof, and that said persons are the managing directors of said Estate of W. O'H. Martin, Incorporated.

VIII. That this action is brought by these plaintiffs and not by the Estate of W. O'H. Martin, Incorporated, for the reason that the said plaintiffs, Clara M. Wight and Gertrude M. Gregory, as such shareholders of the said Estate of W. O'H. Martin, Incorporated, have frequently requested and de-

manded the managing directors of the said Estate of W. O'H. Martin, Incorporated, that the Estate of W. O'H. Martin, Incorporated, should bring this suit, and that the said plaintiffs, Clara M. Wight and Gertrude M. Gregory, have at divers times requested Louise W. Martin, the president of said Estate of W. O'H. Martin, Incorporated, and also of Anna H. Martin, Margaret S. Martin and Edward Barber, the other directors of said Estate of W. O'H. Martin, Incorporated, that they bring this suit, and that on the 9th day of September, 1912, the plaintiff, Clara M. Wight, and John S. Partridge, one of her solicitors and counsel, *journe'd* to the City of Reno, State of Nevada, where is located the principal place of business of the said Estate of W. O'H. Martin, Incorporated, and then and there demanded and importuned of the said directors of the said Estate of W. O'H. Martin, Incorporated, that they should bring this suit, and that thereafter the said Clara M. Wight and Gertrude M. Gregory served upon the managing directors a written demand that they proceed forthwith to bring this suit, which said [3] named written demand was made upon the said managing directors upon the 18th day of November, 1912, and that the said officers and directors of said Estate of W. O'H. Martin, Incorporated, have refused and neglected and still do refuse and neglect to bring this suit, or any suit, for the recovery of the shares hereinafter mentioned, or to compel the officers and directors of the said Washoe County Bank to transfer the shares of stock hereinafter mentioned, on their books, or to issue a new certifi-

cate or certificates therefor, or to pay to said Estate of W. O'H. Martin, Incorporated, the dividends thereon.

IX. That the defendant, George W. Mapes, is the president of the defendant, Washoe County Bank, a corporation, and that the defendant C. T. Bender is the cashier thereof, and that the said defendants George W. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herz, George H. Taylor, A. H. Manning and D. A. Bender are the managing directors of the said Washoe County Bank.

X. That one W. O'H. Martin died on or about the 14th day of September, 1910, leaving a last will and testament wherein and whereby the said W. O'H. Martin bequeathed all of his property and estate to your orators and to the said Louise W. Martin, Anna H. Martin, Margaret S. Martin and to Harry M. Martin and Carl Martin, brothers of your orators and sons of the said W. O'H. Martin, deceased, and the said Louise W. Martin, his wife; that thereafter the defendant Estate of W. O'H. Martin, Incorporated, was formed for the purpose of better conducting and handling the affairs and business of the properties so bequeathed by the said W. O'H. Martin, and that your orators and the said Louise W. Martin, Anna H. Martin, Margaret S. Martin and Carl Martin conveyed all of the said property so bequeathed to them to said corporation and received in exchange therefor the stock of said Estate of W. O'H. Martin, Incorporated.

XI. That amongst the property so conveyed by

said legatees to said corporation Estate of W. O'H. Martin, Incorporated, was a certain fifty (50) shares of the capital stock of the said defendant Washoe County Bank, which said fifty (50) shares became and remained and at all the times herein mentioned was, and ever since has been and still is the property of said Estate [4] of W. O'H. Martin, Incorporated, and in the year 1902 the said defendant Estate of W. O'H. Martin, Incorporated, was and ever since has been, and still is the owner of the said fifty (50) shares of the capital stock of the said defendant Washoe County Bank.

XII. That in the year 1902 the said defendant Estate of W. O'H. Martin, Incorporated, caused to be transferred upon the books of said defendant Washoe County Bank the said fifty (50) shares of capital stock of said Washoe County Bank into the name of the said Harry M. Martin for the purpose only of qualifying the said Harry M. Martin to become a director of the said Washoe County Bank.

XIII. That a certificate for said fifty (50) shares of the capital stock of said Washoe County Bank was thereupon issued by said Washoe County Bank to the said Harry M. Martin and that the said Harry M. Martin then and there upon and with the knowledge and consent of said Washoe County Bank, retransferred the said certificate representing said fifty (50) shares of said capital stock of the Washoe County Bank to the said defendant Estate of W. O'H. Martin, Incorporated, and that it was at all times understood by and between the said defendant Washoe County Bank and said defendant Estate

of W. O'H. Martin, Incorporated, that the said shares should stand upon the books of said defendant Washoe County Bank only to enable the said Harry M. Martin to become a director thereof and that the ownership of the same should be and remain in the said defendant Estate of W. O'H. Martin, Incorporated, and that the sole and only purpose of the transfer of the same into the name of said Harry M. Martin was to qualify him to become a director of said Washoe County Bank.

XIV. That at the time of the transaction alleged in paragraph XIII of this complaint, the said Estate of W. O'H. Martin, Incorporated, was and ever since has been and still is the owner of two hundred (200) shares of the capital stock of said defendant, Washoe County Bank, in addition to the fifty (50) shares thereof hereinabove mentioned, and that it was at all times well understood by said Washoe County Bank that the officers and directors thereof, that the said Harry M. Martin became a director of said Washoe County Bank as representing the interests of said Estate of W. O'H. Martin, [5] Incorporated.

XV. That said Harry M. Martin ceased to be a director of said defendant, Washoe County Bank, in the year 1905.

XVI. That at all times after the transactions alleged in paragraph XIII of this bill of complaint (up to the time hereinafter alleged), said defendant Washoe County Bank continued to pay all dividends upon said fifty shares of stock to said Estate of W. O'H. Martin, Incorporated, and that said Washoe

County Bank continued to treat said Estate of W. O'H. Martin, Incorporated, as the owner thereof.

XVII. That in the year 1911 (the exact time is unknown to your orators, or either of them), said Washoe County Bank for the first time claimed that said Estate of W. O'H. Martin, Incorporated, was not the owner of said fifty shares, and ceased and refused to pay to said Estate of W. O'H. Martin, Incorporated, and further dividends thereon.

XVIII. That since said time in 1911 (the exact time being unknown to your orators, or either of them), your orators are informed and believe, and therefore allege, that the sum of \$850.00 has been declared as dividends upon said fifty shares, but that said Washoe County Bank has refused and neglected, and still does refuse and neglect to pay the same, or any part thereof, and that said sum of \$850.00 is due and payable to said Estate of W. O'H. Martin, Incorporated.

XIX. That at said time in 1911 (the exact time being unknown to your orators, or either of them), when said Washoe County Bank ceased and refused to pay any further dividends on said fifty shares, and claimed for the first time that said shares did not belong to said Estate of W. O'H. Martin, Incorporated, said Estate of W. O'H. Martin, Incorporated, presented to said Washoe County Bank the certificate for said fifty shares, duly endorsed by said Harry M. Martin, and demanded of said Washoe County Bank that it immediately transfer said fifty shares on its books into the name of said Estate of W. O'H. Martin, Incorporated, and issue a new cer-

tificate therefor, but that said Washoe County Bank refused and neglected and still does refuse and neglect to so transfer said stock, or to issue a new certificate therefor.

XX. That the amount in controversy in this cause exceeds the sum of three [6] thousand (3,000) dollars, in this: That the value of the said fifty shares of the capital stock is the sum of ten thousand (10,000) dollars.

To that end, therefore, that your orators may have that relief which they can only obtain in a Court of Equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orators, they now pray the Court that it please your Honors to grant to your orators a writ of subpoena to be directed to the said defendants, thereby commanding them at a certain time and under a certain penalty therein, to be limited, personally to appear before this Honorable Court and then and there, full, true and direct, and perfect answer, make to all and singular the premises, and to sustain, perform and abide by such order, direction and decree as may be made against them in the premises, and that the said defendant, Washoe County Bank, and the said defendants, George W. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herz, George H. Taylor, A. H. Manning and D. A. Bender, be compelled and directed by decree of your Honors to retransfer the said fifty shares capital stock of said Washoe County Bank upon the books of said defendant, Washoe County Bank, and to

issue to the said defendant, Estate of W. O'H. Martin, Incorporated, a certificate or certificates therefor, and to pay to said defendant, Estate of W. O'H. Martin, Incorporated, all dividends accrued or to accrue thereon, and for such other and further relief as may be meet and agreeable to equity, and for their costs most wrongfully herein incurred.

JOHN S. PARTRIDGE,
Solicitor and of Counsel for Plaintiffs.

State of California,
City and County of San Francisco,
Northern District of California,
9th Judicial Circuit,—ss.

T. T. C. Gregory, being first duly sworn, makes solemn oath, and says: That he is one of the plaintiffs, in the above-entitled bill; that he has read the same and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true.

T. T. C. GREGORY.

Subscribed and sworn to before me this 9th day of May, 1913.

[Seal]

W. T. HESS,

Notary Public in and for the City and County of
San Francisco, State of California, Room 708,
Hearst Bldg. [7]

[Indorsed]: No. 1636. In the United States District Court, in and for the District of Nevada, 9th Judicial Circuit. Clara M. Wight, and Otis B. Wight, Her Husband, and Gertrude M. Gregory and

T. T. C. Gregory, Her Husband, Plaintiffs, vs. Washoe County Bank, a Corporation, Estate of W. O'H. Martin, Inc., et al., Defendants. Amended Bill of Complaint. Filed May 10, 1913, T. J. Edwards, Clerk. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco.

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants.

Answer of All Defendants Except Estate of W. O'H. Martin, Incorporated, a Corporation.

Now come all the above-named defendants, except Estate of W. O'H. Martin, Incorporated, a corporation and for answer to said plaintiffs' amended complaint herein, allege:

1. These defendants deny that this controversy is

wholly between citizens of different States, and deny that the said defendants F. M. Rowland and D. A. Bender, or either of them, at the time of the commencement of this action, were residents, citizens or inhabitants of the State of Nevada, and allege that at the time of the commencement of this action, said F. M. Rowland and D. A. Bender, and each of them, were and now are, residents, citizens and inhabitants of the State of California.

2. Deny that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case over which it would not otherwise have cognizance.

3. With respect to the allegation of plaintiff's amended complaint "That this action is brought by these plaintiffs, and not by the Estate of W. O'H. Martin, Incorporated, for the reason that the said plaintiffs Clara M. Wight and Gertrude M. Gregory as said shareholders of the said Estate of W. O'H. [8] Martin, Incorporated, have frequently requested and demanded of the managing director of said Estate of W. O'H. Martin, Incorporated, that the Estate of W. O'H. Martin, Incorporated, should bring this suit, and that the plaintiffs, Clara M. Wight and Gertrude M. Gregory, have, at diverse times, requested Louise M. Martin, the president of said Estate of W. O'H. Martin, Incorporated, and also Anna H. Martin, Margaret S. Martin and Edward Barber, the other directors of said Estate of W. O'H. Martin, Incorporated, that they bring this suit," these defendants are without knowledge.

4. That with respect to the allegation of said

plaintiffs' amended complaint, "That the plaintiff Clara M. Wight and Joseph S. Partridge, one of her solicitors and counsel, journeyed to the City of Reno, State of Nevada, where is located the principal place of business of the said Estate of W. O'H. Martin, Incorporated, and then and there demanded and importuned of the said directors of said Estate of W. O'H. Martin, Incorporated, that they should bring this suit," these defendants are without knowledge.

5. That with respect to the allegation of said plaintiffs' amended complaint, "That thereafter the said Clara M. Wight and Gertrude M. Gregory served upon the said managing director a written demand that they proceed forthwith to bring this suit, which said last-named demand was made upon the said managing director on the 18th day of November, 1912, and that the said directors and officers of said Estate of W. O'H. Martin, Incorporated, have refused and neglected, and still do refuse and neglect to bring this suit, or any suit, for the recovery of the shares hereinafter mentioned, or to compel the officers or directors of said Washoe County Bank to transfer the stock therein mentioned on their books, and to issue a new certificate or certificates therefor, or to pay said Estate of W. O'H. Martin, Incorporated, the dividends thereon," these defendants are without knowledge.

6. That as to the allegations of paragraph X of plaintiffs' amended complaint, these defendants are without knowledge.

7. That with respect to the allegation of para-

graph XI of plaintiffs' amended complaint, these defendants are without knowledge.

8. These defendants deny that in the year 1902, or any other time, the said defendant Estate of W. O'H. Martin, Incorporated, or any one else, caused [9] to be transferred on the books of said Washoe County Bank the said, or any, 50 shares of the capital stock of said Washoe County Bank into the name of Harry M. Martin for the purpose only of qualifying the said Harry M. Martin to become a director of said defendant Washoe County Bank.

9. That these defendants admit that on February 9th, 1903, 50 shares of the capital stock, which then stood upon the books of said bank in the name of the Estate of W. O'H. Martin, Incorporated, was regularly transferred and a new certificate issued therefor to and in the name of Harry M. Martin but these defendants deny that said Harry M. Martin then or thereupon or at any time, with the knowledge or consent of said Washoe County Bank, retransferred the said certificate representing the said 50 shares of said capital stock of the Washoe County Bank to the said defendant, Estate of said W. O'H. Martin, Incorporated. And these defendants deny that it was at all times or any time, understood by or between the said defendants Washoe County Bank and said Estate of W. O'H. Martin, Incorporated, that the said shares should stand upon the books of said defendant Washoe County Bank only to enable the said Harry M. Martin to become a director thereof, or that the ownership of the same should be or remain in the said defendant Estate of W. O'H. Martin,

Incorporated, and deny that the sole or only purpose of said transfer of the same into the name of said Harry M. Martin was to qualify him to become a director of said Washoe County Bank, and deny that it was at all or any time wholly or at all understood by the said Washoe County Bank or the officers and directors thereof that the said Harry M. Martin became a director of said Washoe County Bank as representing the interests of the Estate of W. O'H. Martin, Incorporated. These defendants deny that at any time after the said certificate for the 50 shares of stock was issued to said Harry M. Martin, as aforesaid, that the said Washoe County Bank paid any of the dividends upon the said 50 shares of stock to the Estate of W. O'H. Martin, Incorporated. And these defendants allege that all dividends declared and paid by said Washoe County Bank upon said 50 shares represented by said certificate issued to said Harry M. Martin on February 9th, 1903, as aforesaid, have been paid to Harry M. Martin or his order, or credited by said Washoe County Bank upon the indebtedness of said Harry M. Martin to said Washoe County Bank. And [10] these defendants deny that said Washoe County Bank, after the issuance of said certificate for said 50 shares to said Harry M. Martin, treated or continued to treat said Estate of W. O'H. Martin, Incorporated, as the owner thereof. And these defendants deny that in the year 1911 said Washoe County Bank for the first time claimed that said Estate of W. O'H. Martin, Incorporated, was not the owner of said 50 shares of the capital stock, or for the first time refused to pay,

the Estate of W. O'H. Martin, Incorporated, any dividends thereon. These defendants deny that the sum of \$850 or any other sum is due or payable by said Washoe County Bank to said Estate of W. O'H. Martin, Incorporated.

10. These defendants deny that the Estate of W. O'H. Martin, Incorporated, at any time since the 3d day of February, 1902, has been the owner of or had any title or estate or interest in said 50 shares of stock then transferred to said Harry M. Martin, which is superior to the claim and lien of said Washoe County Bank thereon for the indebtedness of said Harry M. Martin as hereinafter set forth.

11. And these defendants further allege that in the year 1909, said Washoe County Bank first learned that said Estate of W. O'H. Martin, Incorporated, claimed to be the owner of said 50 shares of stock, and then and ever since has refused, to transfer said shares of stock upon the books of said Bank from the said Harry M. Martin to the Estate of W. O'H. Martin, Incorporated, because of the indebtedness of said Harry M. Martin to said Bank and the lien of said Bank upon said stock, all of which said Estate of W. O'H. Martin, Incorporated, in the year 1909, and ever since, well knew. These defendants admit that in July, 1911, the said Estate of W. O'H. Martin, Incorporated, presented to said Washoe County Bank for the first time a certificate for said 50 shares duly indorsed by said Harry M. Martin, and demanded of said Washoe County Bank that it immediately transfer said 50 shares on its books into the name of said Estate of W. O'H. Mar-

tin, Incorporated, and issue a new certificate therefor. And that said Washoe County Bank then refused and still does refuse to transfer said stock as aforesaid, or issue a new certificate therefor. And these defendants allege that the reason of the refusal of said Washoe County Bank to transfer said stock and issue a new certificate [11] therefor as demanded, was and is the indebtedness of said Harry M. Martin to said Washoe County Bank, as hereinafter set forth, and the lien of the said Bank thereon, all of which the said Estate of W. O'H. Martin, Incorporated, then well knew.

12. And these defendants, for further answer to said amended bill of complaint, aver, that on February 10, 1903, the said Harry M. Martin was appointed a director of the said Washoe County Bank, and on the 30th day of said month took his oath of office, as such, and thereafter, by regular election said Harry M. Martin continued to be and was a director of said Washoe County Bank until July 1, 1905. That since the 3d day of February, 1903, and while the said Harry M. Martin was the holder of said 50 shares of stock and a director of said Bank, and since he ceased to be such, the said Harry M. Martin has at various times been indebted to the Washoe County Bank for money borrowed by him from said Bank, and before the year 1909, when said Washoe County Bank first knew that said Estate of W. O'H. Martin, Incorporated, claimed to be the owner of said 50 shares of stock, which stands in the name of said Harry M. Martin as aforesaid, the said Harry M. Martin became, and ever since

has been, and now is, indebted to the said Washoe County Bank for more than \$15,000.

13. That Section 1 of Article IX of the By-Laws of said Washoe County Bank at all times herein mentioned was and now is as follows:

“Section 1. Certificates of stock in such form and device as the trustees may direct, shall be issued to the shareholders of the banking corporation according to the number of shares belonging to each respectively, and those certificates shall be transferable by indorsement and delivery thereof, the transaction to be complete only when recorded upon the books of the banking corporation. But no transfer of stock shall be made upon the books of the corporation until after the payment of all calls and assessments made or imposed thereon, and of all indebtedness due to the banking corporation by the persons in whose name the stock stands on the books of the corporation, except with the consent in writing of the President.”

That at all the times herein mentioned, there has been and now is printed upon the face of each certificate of stock of said Washoe County Bank a statement that said stock is “Transferable only on the books of the company by endorsement and surrender of this certificate after compliance with the conditions printed on the back,” and that each certificate of stock of said Washoe County Bank has printed upon the back thereof the following:

“No transfer of the stock described in this certificate shall be made upon the books of the

corporation until after the payment of all calls and assessments made or imposed thereon, and of all indebtedness due to the banking [12] corporation by the person in whose name the stock stands upon the books of the corporation, except with the consent in writing of the President.”

That when said 50 shares of stock was transferred to the said Harry M. Martin and a certificate issued him therefor, the owner thereof well knew that said stock was liable for any debt of the said Harry M. Martin to said Washoe County Bank, that the Bank had a lien thereon for such debt, and that the same would not be transferred as long as said Harry M. Martin was indebted to the said Bank, except upon the written consent of the president thereto; that the president of said Bank has never consented that said Martin should transfer said stock without the payment of his indebtedness to said Bank; and that said Estate of W. O'H. Martin, Incorporated, when it first claimed to said Washoe County Bank that it was the owner of said 50 shares of stock in 1909, well knew that said Harry M. Martin then was and for a long time prior thereto had been indebted to said Washoe County Bank in an amount in excess of the value of said 50 shares of stock. That said Washoe County Bank did not know that said Estate of W. O'H. Martin, Incorporated, was the holder of said certificate of 50 shares of stock issued to said Harry M. Martin, as aforesaid, or that the said Harry M. Martin had endorsed said certificate of stock until the same was presented to said Washoe

County Bank for transfer in July, 1911, and at said time the said Washoe County Bank was absolutely prohibited by the laws of the State of Nevada from transferring said certificate from the name of Harry M. Martin to any other person until the indebtedness of said Harry M. Martin to said Bank was paid.

And these defendants further answering said amended complaint, aver that it appears from said amended complaint that the plaintiff's cause of action arises out of an agreement which is illegal, against public policy and a fraud upon the stockholders and creditors of said Washoe County Bank, and is such an agreement as precludes the plaintiffs from receiving in a Court of Equity any relief from a situation created in consequence thereof, and prevents the plaintiffs from obtaining the relief asked in this suit.

Wherefore, said defendants pray that the plaintiffs take nothing by this suit, and that defendants have judgment for their costs and such other relief as may be meet and proper in the premises. [13]

CHENEY, DOWNER, PRICE & HAWKINS and
A. E. CHENEY,

Solicitors for said Defendants.

State of Nevada,
County of Washoe,—ss.

C. T. Bender, being sworn, says: He is the secretary and cashier of the defendant, Washoe County Bank, and that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except the matters

therein stated on information and belief, and as to those matters he believes it to be true.

C. T. BENDER.

Subscribed and sworn to before me this 12th day of March, 1914.

[Seal]

JOHN M. WRIGHT,
Notary Public.

My commission expires October 29, 1917.

[Indorsed]: No. 1636. In the District Court of the United States for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, et al., Defendants. Answer of all Defendants, except Estate of W. O'H. Martin, Incorporated, a Corporation. Filed this 14th day of March, 1914. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for said Defendants.

*In the United States District Court, in and for the
District of Nevada.*

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY,
and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, ES-
TATE OF W. O'H. MARTIN, INCOR-
PORATED, a Corporation, GEORGE W.
MAPES, O. W. WARD, F. M. ROWLAND,

C. T. BENDER, FRED STADTMULLER,
RUDOLPH HERZ, GEORGE H. TAYLOR,
A. H. MANNING and D. A. BENDER,
Defendants.

**Separate Answer of the Estate of W. O'H. Martin,
Incorporated, to the Amended Bill of Com-
plaint.**

The defendant, the Estate of W. O'H. Martin, Incorporated, for answer to the Amended Bill of Complaint herein, or so much thereof as this defendant is advised is material or necessary for it to make answer unto, answering says:

I. Admits that the plaintiffs, Gertrude M. Gregory and T. T. C. Gregory, were at the time of filing said bill, and at all times therein mentioned, [14] and now are, husband and wife.

II. Admits that the complainants Clara M. Wight and Otis B. Wight were at the time of the filing of said bill, and at all the times therein mentioned, and now are, husband and wife.

III. Admits that the defendant, the Washoe County Bank, was at the time of filing said bill, and at all the times mentioned therein, and now is, a corporation existing under and by virtue of the laws of the State of Nevada.

IV. Admits that this defendant, the Estate of W. O'H. Martin, Incorporated, was at the time of the filing of said bill, and at all the times mentioned therein, and now is, a corporation organized and existing under and by virtue of the laws of the State of Nevada.

V. Admits that the controversy in this action is wholly between citizens of different states, and admits the citizenship of all of the parties thereto as alleged in paragraph V of said bill.

VI. Admits that the complainants, Clara M. Wight and Gertrude M. Gregory, now are, and for about ten years before the commencement of this action have been, the owners of two hundred (200) shares each of the capital stock of this defendant, and that said complainants were shareholders thereof at all of the times mentioned in said bill, and that this suit is not collusive for the purpose of conferring upon the Court of the United States a jurisdiction of a cause of which it would not otherwise have cognizance.

VII. Admits that the managing officers and directors of this defendant, are the persons named and set out in paragraph VII of said bill.

VIII. Admits that said action was brought by said complainants and not by this defendant for the reason that said complainants Clara M. Wight and Gertrude M. Gregory, as shareholders of this defendant, have requested and demanded of the managing directors of this defendant that this action be brought, and have at divers times requested the president and directors named in said bill that they should institute this action. Admits that the complainants Clara M. Wight and her solicitor, John S. Partridge, journeyed to the City of Reno, State of Nevada, the principal place of business of this defendant, and then and there demanded of the directors of this defendant that they should bring

this suit; admits that thereafter the said [15] complainants, Clara M. Wight and Gertrude M. Gregory, served upon the managing directors of this defendant a written demand that they proceed at once to bring this suit upon the date as in said bill alleged; admits that the officers and directors of this defendant have refused and neglected, and still refuse and neglect to bring any action for the recovery of the shares of stock mentioned in said bill, or any action to compel the officers and directors of said Washoe County Bank to transfer the shares of stock mentioned in said bill on its books, or to issue new certificate or certificates therefor, or to pay to this defendant the dividends thereon.

IX. This defendant admits that the persons named, as it is informed and believes, in paragraph IX of said bill, are the officers and managing directors of this defendant, the Washoe County Bank.

X. Admits all the facts as alleged in said bill in paragraph X thereof to be true.

XI. Admits that all of the averments contained in paragraph XI of said bill are true.

XII. Admits all of the averments contained in paragraph XII of said bill, except it alleges that the transfer of said stock therein mentioned was made by this defendant in the year 1903 instead of the year 1902 as therein alleged.

XIII. Admits that all of the allegations contained in paragraph XIII of said bill are true.

XIV. Admits all of the averments in paragraph XIV of said bill to be true.

XV. Admits the averments of paragraph XV of said bill to be true.

XVI. Admits the allegations contained in paragraph XVI of said bill, but alleges that until July, 1909, the dividends were paid in checks drawn to the order of Harry M. Martin, which were sent to him, by him endorsed and credited to this defendant, and that after said date and until July, 1911, said dividends were paid in checks drawn to the order of Harry M. Martin, but sent directly to this defendant and by it endorsed as owner and which were paid by the defendant bank and credited to this defendant.

XVII. Admits the allegations contained in paragraph XVII of said bill, and alleges that the date when the defendant Bank made the claim alleged, was [16] on or about the month of July, in the year 1911.

XVIII. Admits the defendant Bank has refused to pay this defendant any and all dividends upon said stock from and including July, 1911, down to this time; and alleges the following dividends were declared on said stock and became due and payable to this defendant prior to the commencement of this suit, to wit, July, 1911, \$300.00; January, 1912, \$300.00; July, 1912, \$250.00; January, 1913, \$250.00, amounting in all to the sum of \$1100.00.

And this defendant, further answering, says, that other and further dividends have accrued and become payable to it since the commencement of this suit, and that none of said dividends have been paid to it, and the defendant Bank refused and still re-

fuses to pay the same or any part thereof.

XIX. Admits the allegations contained in paragraph XIX of said bill, and alleges that the true date of the transaction therein referred to, is the month of July, 1911, and further, that in July, 1909, this defendant first demanded of the defendant Bank that it transfer to this defendant the said fifty shares and pay the dividends thereon directly to it.

XX. Admits the allegations contained in paragraph XX of said bill.

WHEREFORE, this defendant prays that it may be dismissed hence with its costs, and for such other and further relief as may be agreeable to equity.

GEORGE SPRINGMEYER,

Solicitor for Defendant, Estate of W. O'H. Martin,
Incorporated.

State of Nevada,

County of Washoe,—ss.

Louise W. Martin, being first duly sworn, deposes and says: That she is an officer, to wit, the president of the Estate of W. O'H. Martin, Incorporated, one of the defendants named in said action; that she has read the foregoing answer and that the same is true of her own knowledge, except as to matters therein stated on her information or belief, and as to those matters, she believes it to be true.

LOUISE W. MARTIN. [17]

Subscribed and sworn to before me this 21st day of March, 1914.

[Seal]

GEORGE SPRINGMEYER,

Notary Public.

[Indorsed]: Original. No. 1636. In the District Court of the United States in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank et al., Defendants. Answer to Amended Bill of Complaint. Filed this 23d day of March, 1914. T. J. Edwards, Clerk. George Springmeyer, Attorney for Estate of W. O'H. Martin.

*In the District Court of the United States, in and for
the District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY
and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate
of W. O'H. MARTIN, Incorporated, a Corpor-
ation, GEORGE M. MAPES, O. W. WARD,
F. M. ROWLAND, C. T. BENDER, FRED
STADTMULLER, RUDOLPH HERZ,
GEORGE H. TAYLOR, A. H. MANNING
and D. A. BENDER,

Defendants.

Opinion.

MASTICK & PARTRIDGE, for Plaintiffs.

CHENEY, DOWER, PRICE & HAWKINS, for
All Defendants Except the Estate of W. O'H.
Martin, Incorporated.

HARWOOD & SPRINGMEYER, for Estate of
W. O'H. Martin, Incorporated.

FARRINGTON, District Judge:

February 9th, 1903, the Estate of W. O'H. Martin, Incorporated, then owning 300 shares of the capital stock of the Washoe County Bank, surrendered its certificate for cancellation, whereupon two certificates were issued, one for 250 shares to the Estate, and one for 50 shares to H. M. Martin. Martin immediately indorsed his certificate and delivered it to his mother, Mrs. Louise Martin, president of the Estate. Since that date the certificate has been in the possession of the Estate, but on the records of the Bank it still stands in the name of H. M. Martin. The transfer was neither a sale nor a gift, but was made solely for the purpose of qualifying Martin to become one of the directors of the Bank. A few days later he was appointed, and continued to hold the office of director from March 1, 1903, until July 1, 1905. On the original certificate for 300 shares, and on the certificate for 50 shares, the following notice was printed:

“No transfer of the stock described in this certificate will be made upon the books of the Corporation until after the payment of all Calls

and Assessments made or imposed thereon, and of all indebtedness due to the Banking Corporation by the person in whose name the stock stands on the books of the Corporation, except with the consent in writing of the president.”

[18]

In November, 1906, more than one year after ceasing to be a director, Martin borrowed \$15,000 from the bank, and as security turned over 479 shares of the capital stock of the Nye County Mercantile Company. At that time this stock was believed to be, and probably was, ample security for the loan. Martin testifies that he could have paid this debt at any time before the panic of October, 1907, but never after that event has he been able to do so. The liabilities of the Mercantile Company at the time of the panic amounted to about \$80,000, to secure which a mortgage was given on its property, and subsequently foreclosed. Except the first year's interest, nothing was ever paid on Martin's debt to the bank. January 15, 1909, a renewal note for \$20,451.64, with interest at 7 per cent per annum, was executed by Martin to the bank in settlement of his original debt. From July, 1903, to July, 1907, inclusive, the dividend checks on the 50 shares of bank stock were issued in the name of, and delivered to, Martin, and by him indorsed to the Estate. From January, 1908, to January, 1911, inclusive, the dividend checks were drawn in favor of Martin, and delivered by C. T. Bender, cashier of the bank, to Fred Stadtmuller, to be mailed to Martin. The instructions were disregarded; the checks were given to Mrs. Martin, and

deposited to the credit of the Estate in the Bank. Martin's name was indorsed on three checks by George H. Taylor, "agent"; on one check by Fred Stadtmuller, "agent"; and on three by Louise W. Martin. Martin testifies that he authorized no one as agent to so indorse his name on the checks. Since January, 1911, the Bank has retained all of the dividends. Cashier Bender was asked by Mrs. Martin in 1909 to transfer the shares of stock on the books of the Bank from the name of H. M. Martin to the Estate; this he refused to do, calling her attention to the notice on the back of the certificate. In July, 1911, the certificate was again presented for transfer. November 12, 1912, a demand was made by the plaintiffs on the Martin Estate to commence suit against the Bank to compel the transfer of the stock. This, also, was refused, whereupon the present action was commenced January 13, 1913. It was tried in September, 1914, but not argued or submitted until November 21, 1916.

The value of the 50 shares of bank stock in question is about \$7,500. [19] The stock of the Estate of W. O'H. Martin, Incorporated, is owned: 7/12 by Mrs. Louise Martin, and 1/12 each by Anna H. Martin, Margaret S. Martin, Carl Martin, plaintiff Clara M. Wight, and plaintiff Gertrude M. Gregory.

Clara M. Wight and Otis B. Wight, her husband, are citizens and residents of Oregon; Gertrude M. Gregory and T. T. C. Gregory, her husband, are citizens and residents of California. The defendants, C. M. Rowland and D. A. Bender, when the suit was commenced, were citizens of California. The re-

maining defendants, including the two corporations, were and are citizens of Nevada. The prayer of the complaint is that the bank be compelled by a decree of this court to retransfer said 50 shares of stock on the books, and to issue to the defendant, Estate of W. O'H. Martin, Incorporated, a certificate therefor, and to pay to said Estate all accrued dividends.

The defendants contend: First, that the Court should not entertain this suit because it is founded on an illegal agreement; second, that the suit is collusive; third, that the Court has no jurisdiction because the case does not exhibit the requisite diversity of citizenship; and, fourth, that the right of the Bank, arising from the statutes of Nevada, the by-laws of the Bank, and the notice on the back of the certificate in question, to refuse to transfer the stock, is superior to any equity held by the Estate of W. O'H. Martin, Incorporated.

On the hearing of defendants' motion to dismiss the amended bill, it was apparently conceded that it was illegal for Martin to act as director after he had indorsed his certificate of stock, and delivered it to his mother for the Estate. On reflection, I have come to a different conclusion. Viewed with the utmost severity, the transaction cannot be characterized as dishonest, unclean or fraudulent. Martin became a director of the Bank in February, 1903, and ceased to be such July 1, 1905. The debt for which a lien is now claimed was not incurred until November, 1906. During the time Martin served as director no injury or fraud was perpetrated, or sought to be perpetrated; neither does it appear that the stock was

put in his name in furtherance of any fraudulent scheme touching the organization, control, or business of the Bank, as in *Bartholonev v. Bentley*, 1 Ohio St., 37; or to enable [20] the Estate to avoid any liability, as in *Smith v. San Francisco & U. P. Ry. Co.*, 35 L. R. A. 309. No suggestion has been made that it was illegal for the Estate to own 300 shares of the capital stock of the Bank. The stock at the time was worth \$150 per share, or \$45,000. It was not at all strange or unbusiness-like in Mrs. Martin, the president of the Estate, and the owner of 7/12 of its capital stock, to desire this interest to be represented in the directorate of the Bank by her son, who was then the acting secretary of the Estate. If the Estate could legally hold 300 shares, it could own and hold 95 per cent of the capital stock. In that event why should public policy restrict the choice at the election of directors exclusively to the persons owning the other five per cent? It seems rather a severe rule which would outlaw for the benefit of the Bank any shares actually owned by the Estate which it may have placed on the corporate books in the name of its agent to qualify him to represent it on the board. A result so serious cannot be permitted, unless the transaction constituted such a violation of the statutes then in force regulating banking corporations in Nevada, that a court of equity must refuse to assist the plaintiffs in their efforts to recover the stock.

It is frequently held that a director of a corporation is an agent, and that he need not be a stockholder unless such a qualification is expressly required in

the charter or by-laws, or by statute. The reasons for requiring an actual, substantial interest, apply with equal force to superintendents and other managing agents, not only of corporate, but of non-corporate business; in such cases a pecuniary interest is not usually required.

21 Am. & Eng. Ency. L., p. 837;

2 Clark & Marshall on Private Corp., sec. 661;

Clark on Corp., p. 484;

Wight v. Springfield & N. L. R. R. Co., 19 Am.

Rep. 412;

In re Election St. Lawrence Steamboat Co., 44

N. J. L. 529, 541.

In *Casper v. Kalt-Zimmers Manfg. Co.*, 159 Wis. 517, 528, the Court uses this language:

“It is settled by the great weight of authority in this country and in England that one who holds the mere legal title to stock is qualified to act as an officer of the corporation, though there is a charter provision or statute requiring officers to be stockholders. * * * One who holds stock in trust for the express purpose of qualifying him as an officer is eligible. * * *

“A rule requiring that the equitable or beneficial interest in the stock should be in a person in order to render him eligible as an officer would [21] exclude all trustees from acting as corporate officers and in a large measure debar them from investing trust funds in corporate enterprises because they could not adequately protect such funds by participating in the active management of the business. The reason given for

a contrary view is that officers of a corporation should be personally interested in its welfare, and that can be the case only when the legal and beneficial interest unite in the same person. We do not so consider it. Trust duties are some of the most sacred duties there are, and the confidence reposed through them is seldom abused. Even where stock is transferred for the express purpose of qualifying one to hold a corporate office, the person so transferring it is personally interested in the sound management of the corporation and would be unlikely to jeopardize his interest by placing the stock in incompetent hands. The rule that merely a legal title qualifies is more in consonance with present business requirements and is fraught with no undue hazards to stockholders. The defendants mentioned were improperly ousted from office.”

In the same effect see:

In *Re Leslie*, 33 Atl. 954;

State v. Ferris, 42 Conn. 560.

Nothing in relation to the qualifications of a director in the articles of incorporation or in the by-laws of the Bank, has been called to my attention. The Corporation Act of March 10, 1865, as amended in 1875, which was in force during the time Martin acted as director, merely required directors of banking corporations to be stockholders, not stock owners. The provision reads as follows:

“The corporate powers of the corporation shall be exercised by a board of not less than

three directors who shall be stockholders in the company.”

Rev. Laws of Nevada, sec. 1223;

Nevada Stats. 1865, p. 359;

Nevada Stats. 1875, p. 68.

This language was copied from a previous Nevada statute originally adopted in December, 1862, and re-enacted by way of amendment in 1864, as follows:

“The corporate powers of the corporation shall be exercised by a board of not less than three trustees, who shall be stockholders of the company, and a majority of them citizens of the United States and residents of this territory.”

Nevada Stats. 1862, p. 163;

Nevada Stats. 1864, p. 50.

Mr. Justice Leonard in *State v. Leete*, 16 Nev. 246, says that under the act of 1862;

“A person was considered and treated as a stockholder by corporations if he appeared to be such upon the books of the corporation.”

It is also a significant circumstance that the legislature which passed the Act of March 10, 1865, declaring that “trustees * * * shall be stockholders in the company,” twelve days later, March 22, 1865, passed an act [22] for the incorporation of railroad companies, in which it was provided that, “No person shall be a director (of a railroad company) unless he shall be a stockholder, owning stock absolutely in his own rights.”

It is impossible to escape the inference that the legislature intended this difference, and that actual ownership of stock in banking corporations should not

be a necessary qualification for a director. A subsequent act "to provide for the formation of corporations for the accumulation and investment of funds and savings" (Stats. 1869, p. 149, sec. 6), reads thus:

"The corporate powers of the corporation shall be exercised by a board of not less than five directors, residents of this State, and a majority of them citizens of the United States, who shall be holders of stock, each of such amount and under such conditions as the by-laws may prescribe, (if a capital is provided for *on* (in) the certificate of incorporation) or members each having deposits with the corporation to the amount of at least one hundred dollars, (if the company has no capital stock.)"

The Banking Act of 1907 (Stats. 1907, pp. 362-3, sec. 5), declares that:

"The affairs and business of any banking corporation doing business under this Act shall be managed and controlled by a board of directors, or trustees, not less than three, nor more than thirteen in number, who shall be selected from the stockholders in the manner provided in the General Incorporation Act, a majority of whom shall be residents of Nevada."

Finally, in 1911 (1 Rev. Stats. Nev., sec. 625), it was enacted that:

"No person shall be eligible to serve as a director of any bank organized and existing under the laws of this State unless he shall be a *bona fide* owner of one thousand dollars of the stock

of such bank, fully paid and not hypothecated.” He must also when appointed:

“take in addition to the usual oath, an oath * * * that he is the owner, in good faith and in his own right of the number of shares of stock required by this act, subscribed by him and standing in his name on the books of the corporation; that the same is not hypothecated or in any *was* pledged as security for any loan or debt.”

Throughout the Act of 1865, which was in force while Martin was a director of the Bank, the holder, as well as the owner, of corporate shares was recognized as a stockholder.

The Act of 1911 cannot be understood otherwise than as changing and adding to the theretofore existing law. Fortunately the Supreme Court of Nevada, long prior to the new legislation, found it necessary to interpret the Act of 1865.

In *State v. Leete*, 16 Nev. 242, a father gave his son certain shares of stock, with a request that a new certificate be issued in the son's name, and [23] proper transfer made on the books of the corporation. This was done. Nothing was paid by the son. The transfer was made in order that the son might be eligible to the office of trustee. The Court held, after a careful review of the statute and authorities, that, “Such a transaction constituted the son a stockholder in the corporation, and made him eligible to the office of trustee,” and that under the law of this State a person who holds shares of stock issued in his name, as well as one who owns them, is recognized as a stockholder.

In a later case, entitled 'Orr Water Ditch Co. v. Reno Water Co., 17 Nev. 168, it was shown that within one month after the trustees of the Water Company were elected, all the capital stock of the corporation was sold, and all its property, personal and real, delivered to George B. Hill, who thereafter had exclusive possession and control. The trustees of the Water Company, though they had disposed of their interests, and of all the property of the company, and in the meantime had made no pretense of acting as trustees, met some three years after the sale and allowed a claim against the Water Company in favor of the Ditch Company. The Court held that when they sold and delivered all their stock to Hill, the trustees ceased to be officers *de jure*, because they were no longer stockholders; and when they met and allowed the account, they were no longer *de facto* officers. As to whether the stock when sold, was transferred on the books of the corporation, the decision is silent. It is impossible to assume in the presence of the finding "that they were no longer stockholders," that the stock still remained on the books of the company in their names. The Water Company attempted to justify the authority of the directors in allowing their claim on no such ground; on the contrary, the argument was *the* inasmuch as the directors had not resigned, they were entitled to hold office until their successors were duly elected and qualified.

I am therefore unable to regard this decision as sustaining the contention that Martin ceased to be eligible to hold the office of director when he returned

the certificate indorsed to the president of the Estate. Under the decision in the Leete case, if Martin had retained possession of the certificate, instead of indorsing and delivering it to his mother, even though he [24] had no beneficial interest, the legality of his election to the office of director could not be questioned.

What, then, was the effect of the indorsement and delivery of the certificate on Martin's right to hold the office of director? The Act of 1865, section 9, provides that corporate stock may be transferred by indorsement and delivery of the certificate, "but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of transfer."

By section 16, the trustees were required to keep a book

"containing the names of all persons, alphabetically arranged, who are or shall become stockholders of the corporation, and showing the number of shares of stock held by them respectively, and the time when they became the owners * * and such book * * shall be presumptive evidence of the facts therein stated in any action or proceeding against the company or any one or more of the stockholders."

Under these statutory provisions, Judge Leonard said the

whole title passes to the transferee, so far as the transferee is concerned, without an entry upon the books; but, as to everybody else, the legal title remains where it was before the transfer.”

State v. Leete, 16 Nev. 242, 250.

The Act of 1865, section 5, confers the right to vote for trustees of a corporation on stockholders:

“Each stockholder, either in person or by proxy, shall be entitled to as many votes as he or she may own, or represent by proxy, shares of stock.”

Section 11 declares that:

“Whenever any stock is held by any person as executor, administrator, guardian, or trustee, he shall represent such stock at all meetings of the company, and may vote accordingly as a stockholder.”

There is no attempt in the Act, as in the statutes of some other States, to differentiate stockholders who may vote for directors from stockholders who are eligible to the office of director. Under the Act, if a person was a stockholder for the purpose of voting, he could have been legally elected director. Stockholding was the sole qualification of a trustee. He was not required to be a *bona fide* owner, or the owner of any specified number of shares; nor was it requisite that he should own stock; it was sufficient that he was a stockholder. [25]

Where a person has the right to vote as a stockholder, he is eligible to any corporate office to which

any stockholder is eligible, and accordingly may be elected a director.

2 Cook on Corp., secs. 612, 623.

An executor may be a director even though the stock does not stand in his name.

In re Santa Eulalia Silver Min. Co., 4 N. Y. S. 174, 5.

Schmidt v. Mitchell, 72 Am. St. Rep. 427, 433.

In State v. Pettineli, 10 Nev. 441, 1500 shares of stock in a mining company having been issued to Pitagna, he indorsed and gave the certificate to a friend; prior to the stockholders' meeting the certificate was returned to him. It was objected that he was not entitled to vote. The Court held that inasmuch as no transfer from Pitagni had been made on the books of the company, there could be no valid objection to his voting the stock. In support of this rule, the Court cited the case entitled In re Election of Directors of the Long Island Railroad Co., 19 Wend. 37, where it was held that at an election of directors the right of an individual to vote must be determined by the transfer book of the company; the inspectors cannot look beyond it.

To the same effect see the following authorities:

Peoples v. Robinson, 1 Pac. 156, considering the California Act, in which the Supreme Court of that State construed the Act of 1853 (Wood's Dig., p. 119), from which the Nevada Act of 1862 was copied.

In re Argus Printing Co., 26 Am. St. Rep. 639, 654.

1 Morawetz on Corp., sec. 483.

If the fact that the certificate of stock on the books of the Bank stood in the name of Martin was sufficient to make him a stockholder within the meaning of the statute, he was certainly qualified to become a director of the Bank, even though he had surrendered the certificate to the Estate, and had no beneficial interest in the stock.

In *Re George Ringler & Co.*, 127 N. Y. 938, 204 N. Y. 30, the facts were similar to those in the present case. Certificates of stock issued to several individuals for the sole purpose of qualifying them to serve as directors, were immediately indorsed to the true owners. Thus the only [26] right of the former to be stockholders or directors rested on the fact that their names appeared on the record of the corporation as holders of stock. It was held that they were not qualified to act either as stockholders or directors. Under the by-laws of the company and the law of New York then in force, no one could be a director unless he had a personal pecuniary interest; and a transfer by a trustee of his entire stock worked a forfeiture of his office, and was equivalent to a resignation. The Ringler case, therefore, is not applicable.

In *Re Argus Printing Company*, 26 Am. St. Rep. 639, 656, 1 N. D. 435, the Court says:

“It was urged that as Faulkner, subsequently to the issue of the stock, had indorsed it in blank, and left it in the possession of Hill, that he (Faulkner) had ceased to be a stockholder, and therefore had no right to vote the stock or be a director. Under our statute, providing that an

unrecorded transfer of stock shall not be valid for any purpose except between the parties, we are clearly of the opinion, as we have already stated in another connection, that until a transfer should be made on the books, Faulkner would continue to be a stockholder for the purpose of voting the stock or of being eligible to the office of director.”

This was said in a North Dakota case. The statute of that State provided that “a stockholder to be entitled to vote, must be a *bona fide* holder, and have stock in his own name on the books at least ten days prior to the election” (p. 648). It was held that the phrase “*bona fide*” was used in contradistinction to “Bad Faith” (p. 651).

People v. Lihme, 109 N. E. 1051, was a proceeding in the nature of *quo warranto*, requiring the defendant to show by what authority he claimed to hold and execute the office of director of the M. & H. Zinc Company, a corporation organized under an Illinois statute, which provided that, “The affairs of such company shall be managed by a board of not less than three nor more than seven directors, who shall be stockholders therein.” It appeared that the Hegeler Estate owned about one-half the capital stock of the Zinc Company; this stock had been left by will to Mrs. Carus, a daughter of the testator, in trust for his seven children. She employed Lihme to act as one of the directors of the corporation, and engaged to pay him for such service 15 per cent of the net profits accruing on the trust stock. Accordingly one share of stock was assigned to him, and a new cer-

tificate was issued in his name by the company. He was elected a director, and immediately thereafter indorsed [27] his certificate, and returned it to the trustee, Mrs. Carus, who placed it in a safe deposit box to which Lihme had no access. At the same time he executed an instrument acknowledging that the certificate had been issued to him for the sole purpose of qualifying him to act as a director of the Zinc Company; that he made no claim to the stock, and that it could not be considered as any part of his private estate. It also appeared that from time to time checks were issued in the name of Lihme by the company, covering the dividends on his single share of stock. These checks were not appropriated by Lihme, but were turned over to the trust. It was held that Lihme was a stockholder within the meaning of the statute; that the fact that he had surrendered his certificate to the trustee did not affect his legal title, since there had been no transfer from him to the books of the company; that the fact that he had no pecuniary interest in the stock did not disqualify him to act as a director, and that a director is a mere agent, and need not be a stockholder, aside from the statutory requirements.

It has been urged with much earnestness that the transaction in question is contrary to public policy. It is not easy to define what was the public policy of Nevada in this regard in 1903, 1904 and 1905, but I hesitate to assume that it was in conflict with Nevada statutes then in force, as interpreted by the courts.

Hartford Ins. Co. v. Chicago etc. Ry., 175
U. S. 91, 100.

This disposes of the contention that the case must be dismissed because "Plaintiffs' cause of action arose out of an agreement which is illegal, against public policy, and a fraud upon the stockholders and creditors of the Washoe County Bank, and is such an agreement as precludes the plaintiffs from receiving in a court of equity any relief from a situation created in consequence thereof."

My conclusion is that the transaction was not illegal, fraudulent, or contrary to public policy. Furthermore, there is no evidence that plaintiffs were parties to the alleged agreement, or knew that Martin had indorsed his stock and returned it to the Estate. The equitable rule invoked is, therefore, inapplicable.

It must be assumed that the Martin Estate as a stockholder in the Washoe [28] County Bank was fully aware of the notice printed on the back of the two stock certificates, to the effect that no transfers of stock would be made on the books of the banking corporation until all indebtedness due it from persons in whose name the stock stands on the books of the Bank is paid.

In the present case when Mrs. Martin, as president of the Estate, demanded the transfer of the 50 shares from the name of H. M. Martin to the Estate, Mr. Bender, cashier, called her attention to this notice, and also to the fact that H. M. Martin was indebted to the Bank.

In the complaint it is alleged that it was understood at all times between the Washoe County Bank and the Estate of W. O'H. Martin, Incorporated, that the 50 shares of stock should stand on the books

of the Bank in the name of H. M. Martin only to enable him to become a director, and that the ownership should be and remain in the Estate. The burden is on the plaintiffs to prove this allegation by a preponderance of the evidence.

If a secret trust was created by the Martin Estate, the lien of the Bank on the stock in question is superior to the trust in favor of the Estate, provided the Bank was ignorant of the trust at the time the loan was made; but if the Bank knew that H. M. Martin was holding the stock in trust for the Estate when the loan was made and the Mercantile Company stock taken as collateral security, it could not with any persuasive effect say that the loan was granted on the strength of H. M. Martin's nominal ownership of 50 shares of its stock.

“It is a well-settled rule in equity that all persons coming into possession of trust property with notice of the trust, shall be considered as trustees, and bound with respect to that special property, to the execution of the trust.”

Mechanics' Bank v. Seaton, 1 Pet. 299;

Curtice v. Crawford County Bank, 118 Fed. 390.

The question is, did the Bank have such notice? Notice to its agents was notice to the Bank. As to the knowledge of the Bank, the testimony is conflicting and unsatisfactory. This, however, is not at all surprising when it is considered that the witnesses are testifying from memory in 1915 as to conversations which occurred in 1903.

The testimony as to what was said to or by direc-

tors Manning and Ward was not admitted because they were not living at the time of the trial. The [29] only testimony tending to show knowledge by president and director Mapes was given by Mrs. Louise Martin as follows:

“Mr. Mapes was very kind; he was very fond of Mr. Martin; he says, ‘Yes, we will have Harry on the Board,’ and then I says, ‘What will I do?’ He says, ‘You will have to give up some stock, you don’t have to give it up, but his name will have to appear on the board as a stockholder.’”
(Trans., p. 33.)

Mr. Mapes testified:

“I stated to Mrs. Martin that no one could be a director of the Washoe County Bank without he owned stock in his own name. Mr. Martin stated to me that she would let him have stock, or give him stock, I would not say which.”

Mr. Mapes also testified that until some time after the \$15,000 loan was made in 1906, he never knew that H. M. Martin was not the owner of the shares of stock standing in his name, and that prior to the loan he had no intimation or knowledge or suggestion that H. M. Martin was not the true owner of the 50 shares of stock. (Trans., p. 165.)

That he did not know H. M. Martin had indorsed the certificate until he was so informed by T. T. C. Gregory in 1911; that he never consented that H. M. Martin should transfer the stock without paying his indebtedness to the Bank. (Trans., p. 170.) And that unless he had believed that H. M. Martin owned

the stock, he never would have consented to his being a director.

Mrs. Martin also testifies that in 1909, Mapes said to her, "Well, Mrs. Martin, I thought you had made Harry a present of that stock."

The cashier, C. T. Bender, and director Rowland, were equally positive in their testimony that until after the lien was made they had no intimation or knowledge of the fact that H. M. Martin was not the true owner of the stock standing in his name. (Trans., pp. 121, 166, 167.)

During the whole of this transaction George W. Taylor was assistant cashier of the Bank; and from 1905, or thereabouts, to 1909, he attended to Mrs. Martin's business, and acted as secretary of the Martin Estate. (Trans., p. 96.) As a witness he was available to both parties to this litigation. Unfortunately, he was not produced. It does not seem, under the circumstances, that presumptions more unfavorable to one side than to the other can be indulged from this circumstance. [30]

1 Greenleaf on Evidence (16 ed.), sec. 1956;
Jones on Evidence, sec. 21.

Taylor transferred the stock in question from the Martin Estate to H. M. Martin, February 3, 1903. Mrs. Martin testified in relation to this transaction as follows:

"I told Mr. Taylor that the directors and president of the Bank agreed to put Harry on the board, and I had come to have the certificates renewed in Harry's name—his name had to appear on the books as a director. * * *

He took the old certificate and renewed it in my son's name," and signed it "in my presence, my son's and my daughter's." (Trans., p. 35.)

He then went out and returned with the new certificate signed by Mr. Ward.

"He handed it over to me, and I handed it over to my son to indorse it. We all sat there in the little old directors' room, and finally—we didn't leave the Bank, we were all three together, my son, my daughter and myself, and I wanted it indorsed; my daughter said, 'Mother, you had better have Harry indorse it right away, have it all complete before you put it in the box.' It annoyed my son that I insisted on having the certificate indorsed right away; he felt I was afraid I would not get it back, so he indorsed it, and we put it in the box, and it has been there ever since. Mr. Taylor was still present when the certificate was handed back. (Trans., p. 38.)

Miss Anne Martin testifies that,

"After the stock had been transferred, I said it should be indorsed back, and given back to us at once, and my brother indorsed it in Mr. Taylor's presence, and returned the certificate of stock to us, and it was put back into our security box, which was there on the table." (Trans., p. 6.)

Harry Martin says:

"This certificate for 50 shares was transferred to me—was given to me, and I indorsed it, and returned it to my mother, in the presence of Mr. Taylor." (Trans., p. 82.)

It is certain that Taylor was present in the room when this transaction occurred, but there is no evidence that he participated in the indorsement or in the conversation, that he was an attentive listener, or that anything was said disclosing fully the real nature of Martin's interest in the stock. How much Taylor actually saw or heard we do not know. No utterance of his is in evidence from which the extent of his knowledge can be determined. Having completed the transfer of the stock to H. M. Martin, it is hardly probable that Taylor was alert to hear what was evidently a discussion of the private affairs of the Martin family, his duty as assistant cashier of the Bank did not require him to do so. The indorsement and delivery, even if he saw it, would not necessarily convey to him the information that Martin had no property interest in the shares; Martin may have given the certificate to his mother as security for the performance of some obligation to her, to the [31] family, or to the Estate. The conversations in evidence which indicate knowledge on Taylor's part, did not occur until after the loan was made, and do not establish knowledge prior to that time. The Martin family was not inclined to give any more information as to its private affairs than was necessary.

I am constrained to find that actual knowledge by the Bank prior to the loan to Martin in 1909, has not yet been shown by a preponderance of the evidence.

There is no merit in the claim the Bank may not resist demand for transfer of the stock because its rights are barred by the statute of limitations.

Whatever lien the Bank may have is more like the lien of a pledge than of a mortgage, and in such cases, while the statute may have run against the debt, it does not run against the lien pledge, so long as the pledges retain possession.

4 Thompson on Corp., sec. 4021;

Wood on Limitations, sec. 21;

Hanchett v. Blair, 100 Fed. 817.

When the loan to H. M. Martin was made, the Mercantile Company undoubtedly was in a prosperous condition, and so remained until the panic in October, 1907. Prior to that date the interest on the loan was paid. It probably never occurred to anyone familiar with then existing conditions that the Bank should call in the loan. After the panic was on, it was too late. Creditors of the Mercantile Company demanded its property as security, or payment of their claims. The value of its capital stock shrank practically to the vanishing point. Conceding that Martin was able to pay his debt at any time prior to the panic, under the circumstances there is no equity in the contention that the Bank should be deprived of its loan, if it has any, on the stock in question, simply because it did not foresee the panic, and realize on the Mercantile Company's stock prior to the financial disturbance.

It is contended that this court has no jurisdiction because the real controversy here is between the Bank and the Martin Estate, both of which are defendants; both are Nevada corporations, and consequently citizens of the same State. If the parties are aligned according to their several interests [32]

the Estate should be grouped with the plaintiffs, then requisite diversity of citizenship disappears, and with it the power of the Court to hear and determine the case. Questions as to the sufficiency of the demand, and as to whether the refusal of the Estate to sue can be regarded as a corporate act, are more technical than substantial. At the Martin family council, held in Reno in September, 1912, all of the directors and stockholders of the Estate were present, with possibly one exception; and at least 11/12 of the capital stock was represented. Louis Martin and Anna Martin, who were both directors, and together owned two-thirds of the capital stock, were there. The outcome was a refusal. The two ladies, Louise and Anna Martin, dominated and controlled the Estate. The written notice made by plaintiffs November 19, 1912, demanding that the officers and directors of the corporation cause suit to be commenced in the name of the corporation against the Washoe County Bank for the recovery of the stock within fifteen days thereafter, produced no results. Under such circumstances it was unnecessary to call a meeting of the stockholders, or to wait until an attempt could be made to elect new directors. Such a course would have been futile. It was evident that plaintiffs could obtain no relief within the corporation itself.

Eldred v. American Palace Car Co., 99 Fed.
168;

Beckett v. Planters C. & B. Warehouse Co.,
65 So. 275;

Doctor v. Harrington, 196 U. S. 579, 588;

Delaware & Hudson Co. v. Albany & Susquehanna R. R. Co., 213 U. S. 435;

Virginia Pass & Power Co. v. Fisher, 51 S. E. 198;

Schoening v. Schwenk, 84 N. W. 916.

The reasons given for the refusal were long connection with the Bank; the fact that W. O'H. Martin had been president of the Bank during the latter years of his life; the publicity of such a suit if brought in Reno; the fear that it would impede the work of Anne Martin, and that the local courts might be influenced by the Bank.

Plaintiffs deny the existence of any agreement or understanding that the Estate should pay the expenses of the litigation. Anna Martin testifies that nothing was said at the family conference to the effect that if the suit were brought by nonresident stockholders the trial could be had in the Federal rather than in the State Court; nothing of the sort was discussed. (Trans., p. 10.) [33]

Mrs. Wight say neither she nor her attorney, Mr. Partridge, stated what they were going to do in case the Estate failed to act; they simply asked that suit be brought; there was no plan. On cross-examination, when asked whether she did not know that she could sue in the Federal Court if the Estate refused to do so, she replied:

“No, I don't know it, because I hadn't thought anything about it; we simply wanted the suit brought, and brought at once; we wanted the corporation to bring it, and naturally when they refused to bring it, then Mrs. Gregory and I

brought it—demanded that they bring it, and they refused, and then we brought the suit.”
(Trans., p. 21.)

Unquestionably, the Martin family preferred not to try the case in Reno, or in the local State Courts, but preference for a Federal tribunal, in the absence of fraud and collusion, is immaterial.

City of Chicago v. Mills, 204 U. S. 321;

Smithers v. Smith, 204 U. S. 632, 644.

In its separate answer the Estate admits every material allegation of the amended bill, the prayer of which is that the Bank be compelled to transfer the said 50 shares of stock on its books, and to issue to said defendant, Estate of W. O'H. Martin, Incorporated, a certificate therefor, and pay to said Estate all dividends accrued, or to accrue.

The case presents no issue between plaintiffs and the Estate, except the bare fact of the refusal; otherwise their interests are identical. This fact alone, however, is not sufficient to defeat jurisdiction of this court, nor can it be regarded necessarily as proof of collusion.

Wheeler v. Denver, 219 U. S. 342, 351.

The conditions precedent to bringing a stockholders' suit seem to me to be present in this case. Under the circumstances, the refusal to bring the suit to compel a transfer of the stock, if the directors of the Estate believed, as they evidently did, that the Estate was entitled to the stock, was on their part a breach of their duty, because the refusal would necessarily result in a loss to the Estate, and a proportionate loss to the stockholders who have sought

to protect their interests in the present action. This was sufficient to enable the plaintiffs to sustain an equitable action in their own names.

4 Thompson on Corp., sec. 4553;

Hyams v. Calumet & Hecla Mg. Co., 221 Fed. 529, 542.

The reasons for the refusal by the Estate are not material save as *they* [34] on the question of collusion. The effect of the refusal is the same whether it is prompted by legal, illegal, weighty, or trivial motives. In order to protect their interests, if the Estate would not act, the plaintiff stockholders were compelled to do so.

Equity Rule 27 provides for such a contingency by declaring that persons having a community interest must be joined on the same side as plaintiffs or defendants, and when anyone refuses to join, he may for such reason be made a defendant. If the refusal is for an illegal purpose, or in order to carry out a concerted plan to confer jurisdiction on the Federal Court, which otherwise could not have had, it would be the duty of the Court, under section 37 of the Judicial Code, to dismiss the case. Such a course is required whenever it appears that the parties thereto have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable in the Federal Court.

In the case of Wowdoin College v. Merritt, 63 Fed. 213, the refusal of the directors who should have commenced the action, was deemed sufficient to support a suit by their *cestui que trust* college.

In *Chicago v. Mills*, 204 U. S. 321, D. O. Mills, a citizen of California, and a large stockholder in the People's Gas, Light & Coke Company, an Illinois corporation, brought suit to restrain the city from enforcing an ordinance limiting gas rates. Mills had served a written demand on the company to bring such a suit; the company declined to do so on the ground that it would excite public prejudice. After the action was commenced, the company made common cause with Mills. An officer of the company contributed to the expenses, without any understanding that he should be reimbursed by the company. The Court said:

“We think the record establishes that the complainant and his counsel honestly believed that such new suit was necessary to protect the stockholders' interests. There is an entire lack of testimony to show any collusive action at the time of the beginning of the suit.”

The decree of the lower Court in favor of Mills for an injunction was sustained. It was considered that the jurisdiction of the Court must be determined with reference to the attitude of the case at the date of filing the bill. The Court also said the answer of the plaintiff that he understood [35] his suit was brought to confer on the Federal Court jurisdiction in a case of which it would not otherwise have cognizance, would not necessarily show collusion. An examination of the opinion filed in the lower Court, reported at 143 Fed. 430, will contribute to a full understanding of the case. There it was held:

“To sustain the charge of collusion, the evidence must show, either directly or inferentially, that there has been some agreement or understanding between the company and the complainant that the suit should be brought—that Mills was not acting for himself and the other stockholders alone, but was a channel through whom the company, with his acquiescence was reaching out for a footing in the United States courts. Was this the state of things between Mills and the company at the time the suit was brought?

“The fact that the company is beneficially interested in Mills’ success, and was, as things have transpired, beneficially interested from the beginning, is not alone sufficient to show this understanding. A stockholder’s suit, the company having refused, is always based upon the assumption that the company is interested, and ought, because of that interest in its own name, to have brought the suit.

“The fact that the same counsel was employed by the company in its suit, and by Mills in his, is not alone sufficient to show collusion. * * * Nor is it to be held that because two clients employ the same counsel respecting the same general end, they are in agreement or collusion as to the means of bringing about the end.”

In the present case the evidence is insufficient to establish collusion.

Let a decree be entered in favor of defendants.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada.

Clara M. Wight and Otis B. Wight, her husband, and Gertrude M. Gregory and T. T. C. Gregory, her husband, Plaintiffs, vs. Washoe County Bank, a Corporation, Estate of W. O'H. Martin, Incorporated, a Corporation, et al., Defendants. Opinion. Filed June 16th, 1917. T. J. Edwards, Clerk. [36]

In the District Court of the United States, in and for the District of Nevada.

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her Husband, and GERTRUDE M. GREGORY and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate of W. O'H. MARTIN, Incorporated, a Corporation, GEORGE W. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,
Defendants.

Decree.

This cause came on to be heard September 4, 1914, upon the amended bill of the plaintiffs, the separate answer of the Estate of W. O'H. Martin, Incorporated, and the answer of the other defendants; the parties appeared in person and by counsel; testimony was taken and thereafter, after briefs were

filed, and on, to wit, November 21, 1916, the same was argued and submitted, and heretofore, to wit, on June 16th, 1917, the Court having fully considered the same made and filed herein its opinion and findings in said cause, from all of which it appears to the Court that the equities alleged in the bill and in the answer of said Estate of W. O'H. Martin, Incorporated, were fully met and denied by the answer of the other of said defendants and are not sustained by the proofs.

It is therefore ORDERED, ADJUDGED AND DECREED by the Court that neither the plaintiffs nor the said Estate of W. O'H. Martin, Incorporated, take anything by this suit, and that plaintiffs' bill herein be dismissed, and that the other defendants herein recover from said plaintiffs and said Estate of [37] W. O'H. Martin, Incorporated, their costs herein taxed at \$153.85, for which let an execution issue.

Done in open court this 19th day of June, 1917.

E. S. FARRINGTON,
District Judge.

[Indorsed]: No. 1636. In the District Court of the United States for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation et al., Defendants. Decree. Filed this 19th day of June, 1917. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for certain defendants. [38]

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, et al.,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, et al.,
Defendants.

Praecepte for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please incorporate in the transcript on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, the following portions of the record, to wit:

The Amended Bill of Complaint.

The Answer of All Defendants Except the Estate of
W. O'H. Martin, Inc.

The Answer of the Estate of W. O'H. Martin, Inc.

The Opinion and Decree of the Court.

The Petition for Appeal.

The Assignment of Errors.

The Order Allowing Appeal and Fixing Amount of
Bond.

The Bond on Appeal.

The Citation on Appeal; and

The Clerk's Certificate.

JOHN S. PARTRIDGE,
Attorney for Plaintiffs and Appellants.

Service of the above and foregoing Praecept acknowledged and copy received this 25th day of August, 1917.

COLE L. HARWOOD,

By S. R. TIPPETT,

Attorneys for Defendant Estate of W. O'H. Martin,
Inc.

Received copy of foregoing this 25th day of August, 1917.

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for all Defendants Except Estate of W.
O'H. Martin, Inc.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight and Otis B. Wight, Her Husband et al., Plaintiffs, vs. Washoe County Bank, a Corp. et al., Defendants. Praecept for Transcript of Record. Filed August 27th, 1917. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco. [39]

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY
and T. T. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate
of W. O'H. MARTIN, Incorporated, a Cor-
poration, GEORGE M. MAPES, O. W.
WARD, F. M. ROWLAND, C. T. BENDER,
FRED STADTMULLER, RUDOLPH
HERZ, GEORGE H. TAYLOR, A. H. MAN-
NING and D. A. BENDER,
Defendants.

Petition for Appeal.

To the Honorable E. S. FARRINGTON, District
Judge:

The above-named plaintiffs, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 19th day of June, 1917, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith; and pray that their appeal be allowed, that citation issue as provided by law and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals of the Ninth Cir-

cuit, under the rules of Court in such cases made and provided:

And your petitioners further pray that the proper order relating to the security to be required of them on said appeal be made.

JOHN S. PARTRIDGE,
Attorney for Appellants.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation et al., Defendants. Petition for Appeal. Filed August 9, 1917. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco. [40]

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY
and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Es-
tate of W. O'H. MILLS, Incorporated, a
Corporation, GEORGE W. MAPES, O. W.
WARD, F. M. ROWLAND, C. T. BENDER,
FRED STADTMULLER, RUDOLPH
HERZ, GEORGE H. TAYLOR, A. H. MAN-
NING and D. A. BENDER,
Defendants.

Assignment of Errors.

Come now the plaintiffs in the above-entitled cause and file the following Assignment of Errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 19th day of June, 1917:

I. That the District Court of the District of Nevada erred in holding that the defendant, Washoe County Bank, prior to the loan to H. M. Martin, had no notice of the equities of the Estate of W. O'H. Martin, Inc., in and to the fifty shares of stock standing on the books of said bank in the name of Harry M. Martin, for the reasons:

(1) That it appears by a preponderance of the evidence that the said Washoe County Bank had notice, at said time, through its president and director, George W. Mapes, its cashier and director, C. T. Bender, and its director, F. M. Rowland that Harry M. Martin was holding said stock as trustee of said estate of said W. O'H. Martin, Inc.

(2) That it appears, by a preponderance of evidence, that said Washoe County Bank had notice, at said time, through its Assistant Cashier George W. Taylor, that Harry M. Martin was holding said stock as trustee for the Estate of W. O'H. Martin, Inc.

(3) That it appears by a preponderance of the evidence that said Washoe County Bank had notice of the equities of the Estate of W. O'H. Martin, Inc., in and to said stock by reason of the disposition of the defendant's checks on said stock, to wit, their

payment to said Estate of W. O'H. Martin, Inc. [41] by said Harry M. Martin;

II. That the District Court of the District of Nevada erred in holding that the failure of the defendant, Washoe County Bank, to produce George W. Taylor, its Assistant Cashier, as a witness, did not create a presumption unfavorable to said defendant the *the* reason that said George W. Taylor, though available to both plaintiffs and defendant, as a witness, was a person hostile to said plaintiffs.

III. That the said District Court erred in dismissing the bill of complaint herein, for the same reasons hereinabove set forth.

IV. That the said District Court erred in holding that the defendants are entitled to recover any costs herein from the plaintiffs.

V. That the said District Court erred in making and entering its decree herein on June 19th, 1917, in favor of defendants and against plaintiffs, for the same reasons hereinabove set forth.

WHEREFORE, appellants pray that said decree may be reversed and that said District Court of the District of Nevada be ordered to enter a decree reversing the decision of the lower court in said cause.

JOHN S. PARTRIDGE,

Attorney for Appellants.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, Defendants. Assignment of Errors. Filed August 9, 1917. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Mastick &

Partridge, Attorneys at Law, Foxcroft Building, 68
Post Street, San Francisco. [42]

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY
and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Estate
of W. O'H. MARTIN, Incorporated, a Cor-
poration, GEORGE W. MAPES, O. W.
WARD, F. M. ROWLAND, C. T. BENDER,
FRED STADTMULLER, R U D O L P H
HERZ, GEORGE H. TAYLOR, A. H. MAN-
NING and D. A. BENDER,

Defendants.

Order Allowing Appeal and Fixing Amount of Bond.

Whereas, in the District Court of the United States for the District of Nevada, on the 19th day of June, 1917, a decree was made and entered in the above-entitled cause, in favor of defendants and against plaintiffs; and

Whereas, plaintiffs have on this 10th day of August, 1917, filed their petition for the allowance of an appeal from said decree to the United States Circuit Court of Appeals, Ninth Circuit, together with an Assignment of Errors in and by which said petition they have prayed that an order be made fixing

the amount of the cost bond which they shall give and furnish on said appeal;

Now, therefore, in consideration of the premises and good cause appearing therefor,—

It is ordered that said appeal be, and the same is hereby permitted and allowed and that a certified transcript of all the record proceedings and documents be transferred to said Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on appeal, in form and substance conditioned and with sureties in accordance with the provisions of the law and the rules of practice of this Court, be fixed at the sum of Two Hundred and Fifty (\$250) Dollars, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal. [43]

Dated: August 10th, 1917.

E. S. FARRINGTON,
United States District Judge.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, Defendants. Order Allowing Appeal and Fixing Amount of Bond. Filed August 10th, 1917. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco. [44]

*In the District Court of the United States in and for
the District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY
and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Es-
tate of W. O'H. MARTIN, Incorporated, a
Corporation, GEORGE M. MAPES, O. W.
WARD, F. M. ROWLAND, C. T. BENDER,
FRED STADTMULLER, RUDOLPH
HERZ, GEORGE H. TAYLOR, A. H. MAN-
NING and D. A. BENDER,
Defendants.

Bond on Appeal.

Know All Men by These Presents: That we, Clara M. Wight, Otis B. Wight, her husband, Gertrude M. Gregory and T. T. C. Gregory, her husband, as principals, and Massachusetts Bonding and Insurance Company, a corporation organized under the laws of the State of Massachusetts, and duly authorized to execute bonds and undertakings in judicial proceedings pending in the courts of the United States, as surety, are held and firmly bound unto the Washoe County Bank, a corporation, Estate of W. O'H. Martin, Incorporated, a corporation, George M. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herb, George H. Taylor,

A. H. Manning and D. A. Bender, in the full and just sum of Two Hundred and Fifty Dollars (\$250), lawful money of the United States, to be paid to the Washoe County Bank, a corporation, Estate of W. O'H. Martin, Incorporated, a corporation, George M. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herz, George H. Taylor, A. H. Manning and D. A. Bender, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, successors, representatives and assigns firmly by these presents.

Sealed with our seals and dated this 18th day of August, 1917.

Whereas the above-named plaintiffs have obtained from the District Court of the United States for the District of Nevada an order allowing said plaintiffs to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit to reverse a decree rendered and entered in the above-entitled cause on the 19th day of June, 1917.

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs shall prosecute such appeal to effect and answer all damages [45] and costs if they fail to make good their plea, then this obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof said plaintiffs, as principals, have executed these presents and said Massachusetts Bonding and Insurance Company, as surety, has caused these presents to be executed by its attorneys in fact thereunto duly authorized, and its corporate

seal to be hereunto affixed this 18th day of August, 1917.

CLARA M. WIGHT,
OTIS B. WIGHT,
GERTRUDE M. GREGORY,
T. T. C. GREGORY,
MASSACHUSETTS BONDING & INSUR-
ANCE COMPANY,
By JOHN H. ROBERTSON,
S. M. PALMER,
Attorneys in Fact.

In the presence of

R. C. HUBBARD,
BLAINE B. COLES.

State of California,
City and County of San Francisco,—ss.

On this 22d day of August, A. D. 1917, before me, H. B. Denson, a Notary Public in and for the City and County of San Francisco, personally appeared John H. Robertson, Attorney in Fact, and S. M. Palmer, Attorney in Fact of the Massachusetts Bonding and Insurance Company, to me personally known to be the individuals and officers described in and who executed the within instrument, and they each acknowledge the execution of the same, and being by me duly sworn, severally and each for himself depose and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the within instrument is the corporate seal of said company, and that said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and

direction of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal]

H. B. DENSON,

Notary Public in and for the City and County of San Francisco, State of California.

State of California,

City and County of San Francisco,—ss.

On this 21st day of August, in the year one thousand nine hundred and seventeen, before me, M. V. Collins, a Notary Public in and for said City and County residing therein, duly commissioned and sworn, personally appeared Gertrude M. Gregory and T. T. C. Gregory, her husband, known to me to be the persons described in, whose names are subscribed to, and who executed the within and annexed instrument and they acknowledged to me that they, executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal]

M. V. COLLINS,

Notary Public in and for the City and County of San Francisco, State of California. [46]

State of Oregon,

County of Multnomah,—ss.

Be it remembered, that on this 18th day of August, A. D. 1917, before me, the undersigned, a Notary public in and for said County and State, personally

appeared Clara M. Wight and Otis B. Wight, wife and husband, who are known to me to be the identical persons described in and who executed the within instrument and acknowledged to me that they executed the same freely and voluntarily.

In witness whereof, I have hereunto set my hand and notarial seal, the day and year last above written.

[Seal]

BLAINE B. BOLES,
Notary Public for Oregon.

My commission expires Jan. 20, 1920.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation et al., Defendants. Bond on Appeal. The Within Undertaking is approved this 23 day of August, 1917. E. S. Farrington, U. S. Dist. Judge. Filed August 23d, 1917. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco. [47]

*In the District Court of the United States in and for
the District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY
and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Es-
tate of W. O'H. MARTIN, Incorporated, a
Corporation, GEORGE M. MAPES, O. W.
WARD, F. M. ROWLAND, C. T. BENDER,
FRED STADTMULLER, RUDOLPH
HERZ, GEORGE H. TAYLOR, A. H. MAN-
NING and D. A. BENDER,
Defendants.

Statement of the Evidence.

BE IT REMEMBERED that on the 4th day of
September, 1914, at a stated term of said court begun
and beholden in Carson City, in the District of
Nevada, before his Honor E. S. FARRINGTON, Dis-
trict Judge, the issue joined in the above-stated case
between the parties came on to be heard before the
said judge without the introduction of a jury, the
plaintiffs being represented by John S. Partridge,
Esq., the defendants Washoe County Bank, George
M. Mapes, O. W. Ward, F. M. Rowland, C. T. Ben-
der, Fred Stadtmuller, Roudolph Herz, George H.
Taylor, A. H. Manning and D. A. Bender, being

represented by Messrs. Cheney, Downer, Price & Hawkins, and defendant Estate of W. O'H. Martin, Incorporated, being represented by Messrs. Harwood & Springmeyer, and upon the trial of that issue the attorneys for the plaintiffs to maintain and prove the said issue on their part, offered the following evidence, to wit: [48]

Testimony of Miss Anne H. Martin, for Plaintiffs.

ANNE H. MARTIN, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination.

I reside in Reno, and am a resident of the State of Nevada and secretary and director of the Estate of W. O'H. Martin, Incorporated.

I remember a meeting of the directors of this corporation at the office of Mr. Harwood. There were present Mrs. Martin, my mother, Miss Margaret Martin, Mrs. Gregory, Mrs. Wight, John S. Partridge, Judge Harwood and myself. Mrs. Martin was president of the Estate of W. O'H. Martin, Incorporated. Mrs. Wight was a director.

I remember Mrs. Wight and John S. Partridge making a demand on the officers and directors of this corporation to bring this suit. Mr. Partridge made the demand urgent. It was the question at issue between us and we refused to bring suit.

My father's name was Wm. O'Hara Martin. He died September 14, 1901.

At the time of his death he owned certain shares of the capital stock of the defendant Washoe County

(Testimony of Anne H. Martin.)

Bank. These shares were distributed to his heirs according to his will. Shortly after the distribution the corporation known as the Estate of W. O'H. Martin, Incorporated, was formed. The shares in question were transferred to the corporation. I remember the occasion when fifty shares of that stock were transferred to Hary M. Martin. On the occasion of that transfer there were present Mr. George Taylor, my mother, my brother, and myself. Mr. Taylor was at that time the assistant cashier of the Washoe County Bank.

Mr. CHENEY.—(Q.) If the Court please, I desire to enter an objection to any—

The COURT.—I presume that transfer was a matter of record?

Mr. PARTRIDGE.—Yes; I am asking now for the physical facts that happened on that day. I will state in this connection that I am putting Miss Martin on the stand somewhat out of order, because she [49] is engaged in a campaign in this State, and desires to get away immediately, if possible. However, I think that objection is well taken.

Mr. CHENEY.—My objection was—if I might be permitted to state it—that any conversation with Mr. George H. Taylor after the transfer of this stock, is not competent as against the Bank, and constitutes no notice to the bank.

The COURT.—I will allow the testimony to go in subject to the objection.

After the stock had been transferred at that meeting I said it should be endorsed back and given to us

(Testimony of Anne H. Martin.)

at once, and my brother endorsed it in Mr. Taylor's presence and returned the certificate of stock to us, and it was put back into our security box, which was on the table.

Mr. DOWNER.—If your Honor please, we desire to move at this time to strike out the testimony of Miss Martin, in so far as it relates to the transfer of this stock, and the alleged endorsement of it, and transferring it back, upon the ground that the testimony—

The COURT.—You can state your grounds, and the matter will be passed on finally. Counsel for plaintiffs claims it constituted notice, and I think he is entitled to urge that on the argument; there is no jury here so it makes no difference.

Mr. DOWNER.—All I desire is that we be not deemed to have waived the objection that this was an illegal contract—the contract they alleged in their complaint was an illegal contract, and utterly void. We wish to interpose that objection at this time, to show our position with reference to it.

The COURT.—Of course for the present the motion will be overruled.

Mr. DOWNER.—I suppose an *d* exception may be noted, if your [50] Honor please.

The COURT.—This is simply a *pro forma* ruling.

This meeting took place in the directors' room of the bank.

Cross-examination.

Mrs. Wight and John S. Partridge came to Reno in September, 1912. On the afternoon of the day of

(Testimony of Anne H. Martin.)

their arrival my mother, Mrs. Wight, Miss Margaret Martin, Judge Harwood, my brother Carl, Mr. Partridge and myself were present in Judge Harwood's office. Mr. Partridge and Mrs. Wight were pressing us to bring this suit and we refused to bring it. Mr. Partridge asked us to bring a suit against the bank to recover this stock which belonged to us. Both I and my mother answered him and said we would not bring it. My mother was opposed to bringing the suit and so was I, because we disliked extremely the publicity in having that suit in Reno on account of my father's relations with various men there, and I had a reason too. I did not want the publicity, particularly in Reno, in connection with the work I was doing. My mother gave the first reason that I gave. Nothing was said to the effect that if a suit was brought by a nonresident stockholder the trial would not be held in Reno, but might be held in the Federal court. At the time of the meeting the directors of the Martin Estate Company were Mrs. Martin, Mrs. Gregory, Mrs. Wight and myself. The meeting was not a formal meeting of the board of directors. No formal meeting to take action on this demand was ever had. I was secretary of the company. The stockholders of the company at the time of this meeting were Mrs. Gregory, Mrs. Wight, Margaret Martin, Carl Martin, my mother and myself. So far as I remember, no action was ever asked on behalf of the stockholders.

At the time of the transfer of the fifty shares of stock to Harry Martin, Mr. George Taylor has no re-

(Testimony of Clara M. Wight.)

lation whatever to the Martin Estate Company. I was secretary of the company and my brother Harry [51] Martin kept the books.

I feel now that the suit is a matter of necessity. So far as I know, there has been no agreement by the Martin Estate Company to pay any portion of the cost of prosecuting this suit. I may perhaps have given information to Judge Harwood to assist him in preparing the answer in this case.

Redirect Examination.

Shortly after this meeting, Mrs. Wight and Mrs. Gregory were removed as directors of the Estate of W. O'H. Martin, Incorporated. At the time of the meeting the stock in the estate company was owned as follows: Mrs. Martin seven-twelfths; Anne Martin one-twelfth; Mrs. Gregory one-twelfth; Mrs. Wight one-twelfth; Margaret Martin one-twelfth; Carl Martin one-twelfth. In other words, my mother who was there refusing to bring the suit, represented a majority of the stock.

Testimony of Mrs. Clara M. Wight, for Plaintiffs.

CLARA M. WIGHT, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination.

I reside in Portland, Oregon. My husband's name is Otis B. Wight, a physician. I am a daughter of Mrs. Louise Martin. I remember the occasion in September, 1912, when Mr. Partridge and I went to Reno. We wanted a distribution of the estate, and

(Testimony of Clara M. Wight.)

we went there to talk the matter over with my mother and sisters. A meeting was held in Judge Harwood's office. There were present Judge Harwood, my mother, Mrs. Martin, Anne Martin, Margaret Martin, John S. Partridge and myself. Mr. Partridge and myself asked the others to bring this suit but they refused to do so. They said they would not. As reasons, they said they disliked to bring it on account of our relations, our living in Reno and the notoriety we would gain through it. They said they preferred not to bring it in the State court on account of the [52] feeling which would naturally arise, because the bank was at Reno.

The meeting was held in September, 1912, about the 6th or 8th. In November of that year I signed a demand that they bring suit. The paper shown me is a copy of that demand. (Witness here refers to Plaintiffs' Exhibit No. 1 for Identification.)

Cross-examination.

At this meeting I wanted the suit brought and there was a refusal on the part of Anne Martin and my mother. Neither Mr. Partridge nor myself stated what we were going to do in the event they did not bring the suit. I am positive of that. We had no plan to bring a suit at that time. We simply asked that a suit be brought. I understood that a suit could be brought by a minority stockholder in a corporation if the corporation did not itself bring the suit. I did not know anything about my rights in the Federal courts as a nonresident of Nevada.

(Testimony of Clara M. Wight.)

Redirect Examination.

At the time of this meeting, neither Mrs. Gregory, Mr. Partridge nor myself had arrived at any determination of bringing a suit. (Witness is here shown Plaintiffs' Exhibit No. 1 for identification.) It was about the time of the preparation of this demand that we first decided to bring a suit. Prior to the meeting in September, Mr. Partridge and myself did not discuss the right of stockholder to bring a suit in the event of a refusal by the corporation. (Witness is here shown Plaintiffs' Exhibit No. 1 for identification.) It was about that time that we first decided to bring a suit. When I came to Reno on the 9th of September, I do not know that Mr. Partridge had told me that if the Martin Estate Company did not bring the suit that I had the right to bring it. I know, however, that in the event of the Martin Estate Company's refusal there was some other recourse, but Mr. Partridge and I had not discussed that.

Testimony of Mrs. O'H. Martin, for Plaintiffs.

MRS. W. O'H. MARTIN, called as a witness on behalf of plaintiffs, [53] having been duly sworn, testified as follows:

Direct Examination.

In November, 1912, I was the President and a Director of the Estate of W. O'H. Martin, Inc. (Witness is here handed Plaintiffs' Exhibit No. 1 for identification.) In November, 1912 I received a copy of this paper, signed by my daughters, Mrs. Wight and Mrs. Gregory. (Judge Harwood here

(Testimony of W. O'H. Martin.)

produces the original of Plaintiffs' Exhibit No. 1 for identification.) I am familiar with the signatures of Mrs. Wight and Mrs. Gregory. (The original is here handed to witness.) The signatures hereto are the signatures of Mrs. Wight and Mrs. Gregory. This is the paper that I received on or about the 19th of November, 1912.

WHEREUPON Plaintiffs' Exhibit No. 1, being a letter from Clara Martin Wight and Gertrude M. Gregory to the officers and directors of the Estate of W. O'H. Martin, a corporation, dated November 19, 1912, was admitted in evidence and read as follows:

Plaintiffs' Exhibit No. 1—Letter, November 19, 1912, Clara Martin Wight et al to Officers and Directors of the Estate of W. O'H. Martin, a Corporation.

“You and each of you will please take notice that the undersigned hereby demand that within fifteen (15) days from the date hereof, you cause a suit to be commenced in the name of said corporation against the Washoe County Bank for the recovery of the fifty (50) shares of the capital stock of said Washoe County Bank standing in the name of Harry M. Martin, and that within said time you begin such legal proceedings as may be necessary or proper to compel said Washoe County Bank to transfer said shares into the name of said Estate of W. O'H. Martin.”

**Testimony of Mrs. Gertrude M. Gregory, for
Plaintiffs.**

MRS. GERTRUDE M. GREGORY, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination. [54]

I reside in San Francisco. The plaintiff, T. T. C. Gregory is my husband, and I am a daughter of Mrs. Martin. At the time subsequent to the 19th of November, 1912, I had a conversation with my mother regarding the written demand that I had made upon her to bring a suit against the Washoe County Bank. I was ill in the hospital, and she came to see me from Nevada. She told me that they had received this demand, and she said that indeed she would not bring suit, did not intend to do anything of the kind, because my sister Anne was in the East, and that she was not going to do anything unless Anne were here. She would not do anything, in fact, unless Anne were here. I remember her telling me that then.

**Testimony of Mrs. W. O'H. Martin, Recalled for the
Plaintiffs.**

Direct Examination.

My husband's name is William O'Hara Martin. At the time of his death he lived in Reno, and was the owner of three hundred (300) shares of stock of the defendant, Washoe County Bank. After his death the stock was distributed to the Estate of W. O'H. Martin, Inc. In 1901, when the corporation was

(Testimony of Mrs. W. O'H. Martin.)

formed, it had the following stockholders: Myself, president, Anne H. Martin, Gertrude M. Gregory, Clara M. Wight, William O'Hara Martin, Arthur Carl Martin and Margaret Stone Martin. Harry M. Martin was never a stockholder of the corporation. Prior to his death, Mr. Martin had been president of the Washoe County Bank for a number of years. I made an appeal to the Bank to have my son represent us on the Board of Directors.

Q. Who did you have that talk with?

A. Oh, I think it was Mr. Mapes, Mr. Bender, Mr. Martin Ward, who has departed, and I can't remember all the names, but there were quite a number; I went among them all, and they were very favorable to my son on the board.

Q. Now, in regard to Mr. Mapes, what was his position in connection with the bank at the time you had this talk with him? [55]

A. President; he succeeded Mr. Martin as president.

Q. What connection did Mr. Ward have?

Mr. CHENEY.—I object to any testimony regarding a conversation had between Mrs. Martin and Mr. Ward, as she has said that Mr. Ward is now deceased, and he being the other party to the transaction, Mrs. Martin is incompetent to testify respecting it.

Mr. PARTRIDGE.—I am not exactly familiar with the statutes of the State of Nevada; is there any statute which forbids the person to testify with regard to talks with deceased persons?

Mr. CHENEY.—When the other party to the

(Testimony of Mrs. W. O'H. Martin.)

transaction is dead, the party is prohibited from testifying—is disqualified.

WITNESS.—There is another gentlemen, Mr. Rowland was very favorable to it, too, he is still living.

Mr. PARTRIDGE.—(Q.) Now, Mrs. Martin, in regard to your conversation with Mr. Bender, what did you say to him about your son becoming a director?

A. Well, we were a little worried, Mr. Partridge; of course we were not represented on the board at all, and we had quite a little at stake in the bank, and I felt quite unsafe not to have a representative in the bank, and so I spoke of my son Harry; I was better satisfied to have a representative, because I was ignorant of business and all, and I thought probably my son could watch my interests; Mr. Mapes said they needed no watching at all, that I would be perfectly safe without being represented, but I wanted to be represented; that was the conversation I had.

Q. Did you tell any one of these gentlemen that you wanted to be represented?

A. Yes, that was my reason for wanting my son on the board.

Q. Do you remember who was the first one of these gentlemen that you told that to?

A. Oh, I went among the directors first; I didn't [56] approach Mr. Mapes first, because I thought I would leave him for the last. I asked Mr. Martin Ward, who has departed, so we cannot have his evi-

(Testimony of Mrs. W. O'H. Martin.)

dence—Mr. Martin Ward, and who were the directors then? Mr. Manning.

Mr. CHENEY.—The same objection applies to Mr. Manning.

A. They are both departed, but they sanctioned it; I had four of them, I had four of the directors on my side.

Mr. CHENEY.—I move to strike the answer out.

The COURT.—That may go out.

Mr. PARTRIDGE.—(Q.) Did you talk to Mr. Bender about it?

A. I don't remember that, I don't think I did.

Q. Did you talk to Mr. Rowland about it?

A. Yes.

Q. What did you say to him?

A. Well, what I said before, that I wanted to be represented; we had considerable stock in the bank, and I felt a little uncertain, you know; there was nobody to represent me; and I wanted to take the other property that was left us, and I wanted a representative; I felt that I had no support.

Q. Did any one of these gentlemen tell you how to proceed, what was necessary in order to have your son become a director? A. Why, yes.

Mr. DOWNER.—Just a moment, Mrs. Martin, I think Mrs. Martin had better be asked to give as near as she can the conversation; not to answer the question as to whether they told her how to proceed, but she should be asked what they said.

The COURT.—I think so. Mrs. Martin, can you tell just what you said, and the reply which was

(Testimony of Mrs. W. O'H. Martin.)

made by the various directors to whom you talked?

A. Yes, they were all very favorable in regard to making my son a director.

Q. You are simply giving the conclusions; we want to know if you recollect just what was said, just the language that was used?

A. I approached them—of course two gentlemen are gone and they [57] cannot testify.

Q. Not those two. The others.

A. I don't think I approached Mr. Bender; and I left Mr. Mapes for the very last, because I thought I would rather handle him the last; so they were all very favorable; I said I felt a little uncertain—shall I repeat the same thing again?

Q. Which one of these gentlemen did you speak with first? A. I think Mr. Manning first.

Q. Which one did you speak to next?

A. Martin Ward, who has departed.

Q. With whom did you speak next?

A. I think Mr. Rowland.

Q. Now do you remember just what you said to Mr. Rowland?

A. Just what I said before; I felt alone, and we had a great deal of money in the bank, and I felt unsafe; I felt I wanted to be represented; I had been ignorant in regard to the money affairs; and all; and I felt better if I could put my son on the board; and the gentlemen were all very nice to me, they were all in accord; they were all willing to put my son on, and there was no trouble there at all.

(Testimony of Mrs. W. O'H. Martin.)

Q. What did Mr. Rowland say, *do remember* the words he said?

A. Yes, he says "I am very fond of Harry Martin," he says, "Mrs. Martin, I will do everything I can for you, I would like him on the board," and all the other gentlemen were the same way, they were very kind to me.

Mr. PARTRIDGE.—If your Honor please, I think under the rule, it is not considered a leading question if the witness' attention is directed to a particular thing—a particular part of a conversation, am I right about that?

The COURT.—Well, I will permit you to do so.

Mr. PARTRIDGE.—(Q.) Mrs. Martin, do you remember whether [58] any one of these gentlemen said anything about the necessity of Mr. Harry Martin being a stockholder?

A. Yes.

Q. Who was it?

A. Mr. Mapes is the only one I approached, and I left Mr. Mapes for the east.

Q. What was it Mr. Mapes said about that point?

A. He said Harry would have to have stock to be represented on the board; it was one Sunday morning, I remember very clearly, my daughter was outside in the carriage; she remained outside, I said, "I will go in and see Mr. Mapes"; I met him at his home, and I told him what I wanted; he was always very fond of my son, and I says, "How will I go ahead, how will I proceed?" and he says, "You will have to turn over some stock to Harry." May I go

(Testimony of Mrs. W. O'H. Martin.)

on about the amount of the shares, and all?

The COURT.—Go on and tell the conversation.

A. We had three hundred shares of stock in the bank; we had one certificate in fifty shares, and the other certificate in two hundred and fifty, and I ignorantly—I didn't want to break up our stock certificate, so I turned that over.

Mr. PARTRIDGE.—You are going a little fast for us.

A. Oh, am I?

Q. What we are trying to get at now is what happened, or what was said between you and Mr. Mapes that Sunday morning when you called at his house?

A. As I said before, he was very favorable to having Harry on the board, and he told me I would have to give up some stock so I could be represented on the board of directors—not to give it, I didn't give it, I just handed it over.

The COURT.—No, just tell the conversation, Mrs. Martin.

A. Well, that is about all. Mr. Mapes was very kind; he was very fond of Mr. Martin; he says, "Yes, we will have Harry on the board," and then I says, "What will I do?" He says, "You will have to give up some stock, you don't have to give it up, but his name will have to [59] appear on the board as a stockholder."

Mr. PARTRIDGE.—(Q.) Did you then proceed to cause any stock to be transferred to his name?

A. I did, yes, fifty shares.

Q. You say the Martin Estate Company had three

(Testimony of Mrs. W. O'H. Martin.)

hundred shares? A. At the time, yes.

Q. Was that in one certificate or two, Mrs. Martin? A. Two.

Q. One certificate for how many shares?

A. Two hundred and fifty.

Q. And the other for what?

A. For fifty shares.

Q. What did you do with reference to those certificates?

A. I don't understand your question. How did I proceed?

Q. Did you cause either one of them to be changed in any way?

A. I did; I have forgotten exactly how soon after the certificates were changed, but I went to the old directors room and had them changed before Mr. Taylor—his name, you know, not changed in the amount, but changed to Harry M. Martin.

Q. Let me ask you this; did you notify anybody what you were going to do, or how did the thing come about? A. Did I do what?

Q. Did you tell anybody what you were going to do, anybody connected with the bank?

A. Yes, they all knew I was going to change it so Harry could represent me on the board.

Q. You went there, did you? A. I was there, yes.

Q. Did you have the two certificates with you when you went there?

A. I went to the deposit box and got this certificate of fifty shares out.

Q. Where was your deposit box?

(Testimony of Mrs. W. O'H. Martin.)

A. Number 92, we have always had the same.

Q. You got one certificate out, did you?

A. Yes.

Q. For how many shares? A. Fifty shares.

Q. What did you do with it?

A. I gave the certificate to Mr. Taylor, Mr. Taylor was present at the time, and made out the certificate; and my son was there, and my daughter Anne Martin.

Q. Don't go too fast for me, I am a little slower than you are. [60]

A. Excuse me, Mr. Partridge.

Q. Did you hand the certificate to Mr. Taylor?

A. Yes.

Q. When you went into the bank, where was Mr. Taylor?

A. Mr. Taylor was in the body part of the bank, but when we came in, I have forgotten to whom I spoke, but we met Mr. Taylor very soon in the director's room, and we got our box out, and took that certificate out.

Q. When you first went in Mr. Taylor was in the body of the bank? A. I think so.

Q. Did you say to him or tell him what you wanted? A. When I met him?

Q. In the outer part of the bank, what did you tell him?

A. I am not positive. I don't think I met Mr. Bender that time; it is quite a long time ago, but Mr. Taylor was present.

Q. What did you tell Mr. Taylor?

(Testimony of Mrs. W. O'H. Martin.)

A. I told him that the directors and president of the bank agreed to put Harry on the board, and I had come to have the certificate renewed in Harry's name— his name had to appear on the books as a director.

Q. Did you hand Mr. Taylor the certificate?

A. I did, yes.

Q. What did he do with it?

A. Why, he took the old certificate, and renewed it in my son's name.

Q. Did that right there in your presence?

A. In my presence, my son's and my daughter's.

Q. Made out a new certificate, did he?

A. Yes. (Witness here produces a certificate. This certificate has never been out of our box since it was endorsed.) I am familiar with the handwriting of Mr. Ward and Mr. Taylor. The signatures on the certificate are those of Mr. Ward and Mr. Taylor.

WHEREUPON, the Plaintiffs' Exhibit No. 2, being a certificate of stock of the Washoe County Bank, was admitted in evidence and read as follows:

Mr. PARTRIDGE.—The certificate reads as follows: [61]

Plaintiffs' Exhibit No. 2—Certificate of Stock of the Washoe County Bank.

“Capital, \$500,000.00. Number 171. Shares 50. This certifies that H. M. Martin, of Reno, Nevada, is entitled to Fifty shares of the capital stock of the Washoe County Bank of One Hundred Dollars each, transferable only on the books of the Bank by endorsement and surrender of this certificate after

(Testimony of Mrs. W. O'H. Martin.)

compliance with the conditions printed on its back.
Reno, Nevada, Feby. 9th, 1903.

“GEO. H. TAYLOR, M. E. WARD,
 A. Cashier. Vice-President.”

On the back: “No transfer of the stock described in this certificate will be made upon the books of the corporation until after the payment of all calls and assessments made or imposed thereon, and of all indebtedness due to the banking corporation by the person in whose name the stock stands on the books of the corporation, except with the consent in writing of the president.”

Then there is the signature of H. M. Martin.

Q. I will ask you before I deliver this to the clerk, Mrs. Martin, whether that endorsement on the back is the signature of your son, H. M. Martin? (Hands certificate to witness.) A. It is his signature, yes.

(The certificate of stock is admitted in evidence, and marked Plaintiffs' Exhibit No. 2.)

Q. Now, Mrs. Martin, when Mr. Taylor brought the certificate in the room—

A. (Intg.) Oh, he didn't bring it in the room; he signed it right before us; we were all there, right in the little [62] old directors' room.

Q. Was Mr. Ward there too?

A. No. Mr. Ward was not there; my son, my daughter, Mr. Taylor and myself.

Q. Had he taken it out to be signed by Mr. Ward?

A. Yes, he had; I remember him getting up and leaving his chair, and going out and returning, and handing it to me.

(Testimony of Mrs. W. O'H. Martin.)

Q. And he, himself, signed it there, did he?

A. Yes, right before us; he left that signature to the last.

Q. When he signed it, what did he do with it?

A. He handed it over to me, and I handed it over to my son to endorse it—may I tell what happened?

Q. Yes.

A. I handed it to my son, and he was a little annoyed.

Mr. CHENEY.—This will be considered under the objection as before?

The COURT.—It will go in subject to the same objection urged to the first conversation.

Mr. PARTRIDGE.—(Q.) Now, Mrs. Martin, will you tell us just what happened?

A. We all sat there in the little old directors' room, and finally—we didn't leave the bank, we were all three together, my son, my daughter and myself, and I wanted it endorsed; my daughter said, "Mother, you had better have Harry endorse it right away, have it all complete before you put it in the box"; it annoyed my son that I insisted on having the certificate endorsed right away; he felt I was afraid I would not get it back, so he endorsed it, and we put it in the box, and it has been there ever since.

Q. Will you state whether or not when Harry Martin endorsed that certificate and handed it back to you, Mr. Taylor was still present? A. Yes.

Q. Now, Mrs. Martin, following upon that transaction, will you state whether Mr. Martin, your son, was elected a director of the bank? [63]

(Testimony of Mrs. W. O'H. Martin.)

A. He was elected a director of the bank, the very next week I think he was there with the other directors.

Q. Do you recollect about how long he remained in Reno after that—I refer now to Harry Martin?

A. I think he was a director—he could not have been a director more than two years, until he went to Tonopah.

Q. That would be until what year?

A. He was made a director in 1904.

Q. 1903.

A. 1903, you are right; it was the year my daughter was married, it was 1903, and we were all living in Reno then.

Q. Now, what I want to get is about when he ceased to be a director, if you recollect.

A. I don't remember exactly when his name was taken off the book as a director—he went to Tonopah.

Q. Can you recollect when you left Reno?

A. Yes.

Q. When?

A. That was in the summer, I think it was in May, 1904—1904 or 1905, I am not quite sure, because I remember the year Mr. Taylor was made a director.

There were several dividends declared on these fifty (50) shares of stock while Harry Martin was in Reno, two at least in January and July. I know that Harry Martin never received any dividends on that stock. Up to the year 1909 the dividend checks were sent to my son for endorsement. After he en-

(Testimony of Mrs. W. O'H. Martin.)

dorsed them he sent them back to me, and I took them to the bank immediately and re-endorsed them in the Estate's name, by Louise W. Martin, President, of the Estate of W. O'H. Martin, Inc., across the back.

Q. Immediately after this transaction in 1903, will you state whether or not, Mrs. Martin, you know whether Harry Martin obtained any dividends on the stock? A. Not one.

Mr. CHENEY.—I object, may it please the Court, as to what took place between Harry Martin and the Martin Estate Company [64] unless it was done in such a way it was brought to the notice of the bank, it is not competent evidence.

Mr. PARTRIDGE.—That, of course, would be true, except these are the dividend checks of the bank itself, and we will show they were deposited right back in the bank to the account of the Martin Estate Company.

The COURT.—I will allow you to put in proof, and it will be subject to a motion to strike out if it is not proper.

Mr. CHENEY.—I would like to inquire at this time, where evidence is admitted subject to the objection, whether a motion to strike is necessary in order to preserve that objection?

The COURT.—I don't think so; it will not be, and never has been in such a case. But there is this thought, Judge Cheney, when testimony is admitted in this way. I don't care to have it remain in the record unless my attention is called to it again. If

(Testimony of Mrs. W. O'H. Martin.)

it remains there, and my attention is not called to it, and I fail to pass on it, I shall not allow you an exception.

Mr. CHENEY.—No, I don't suppose it will be necessary to call attention to it by formal motion, if attention is called to it in the argument?

The COURT.—No, it is simply that my attention is called to it; I don't want to overlook the matter, and be found to be in error on a matter on which I have never passed.

Mr. CHENEY.—Oh, no, that would not be fair to the Court.

Mr. PARTRIDGE.—Will you read the question?
(The reporter reads the last question.)

A. He never obtained any dividends on that stock.

Q. Up to the year 1909, do you know of your own knowledge what became of the dividend checks?

A. Up to that time?

Q. Yes. A. You mean up to that time? [65]

Q. Yes?

A. Why, the dividend checks were sent to my son Harry after the meetings, you know, the semi-annual meetings, for endorsement—were sent to Tonopah to my son Harry Martin.

Q. Now, Mrs. Martin, after your son Harry had endorsed them, what did he do with them?

A. Why, he sent them to me, sometimes it was maybe a week he had a check, but he always sent them to me in a letter, enclosed in an envelope, and I took them to the bank immediately and reindorsed them in the Estate's name, by Louise W. Martin, presi-

(Testimony of Mrs. W. O'H. Martin.)

dent of the Estate of W. O'H. Martin, Incorporated, across the back.

Q. When you had so endorsed them, what did you do with them?

A. I handed them either to Mr. Bender or Mr. Taylor, or somebody, but we had credit on the pass-book, or credit on the bank-book, I think that will show.

Q. During that period of time do you know what Mr. Bender's position was in the bank?

A. Cashier.

Q. Did you ever hand these checks personally to Mr. Bender for deposit?

A. I may have handed them to him, or handed them at the window, I can't remember that, but Mr. Bender had seen a number of checks later on.

Q. When later on is it, if you know, that he had seen a number of these checks?

A. When? Do I remember how long later on he had seen these checks?

Q. Yes.

A. Well, he had seen all the checks, I think, that had been sent to the bank, but I don't remember; I could not state exactly how many times I had handed them to Mr. Bender; our relations were very friendly, and I would hand them to him, or hand them in the window; I can't remember exactly how many checks I handed him, or at what time.

Q. Now, Mrs. Martin, do you remember that after 1909, that is, the early part of 1909, that there was any change in the custom of the bank [66] in re-

(Testimony of Mrs. W. O'H. Martin.)

gard to sending the checks to Mr. Martin, and by him endorsing them to you? A. After 1909?

Q. Yes.

Mr. CHENEY.—I desire to interpose the objection, may it please the Court, that is a transaction after the date that Harry Martin became indebted to the bank, and is immaterial as affecting the lien of the bank upon this stock.

The COURT.—I will admit that subject to the objection, if Mr. Partridge insists on it.

Mr. PARTRIDGE.—Oh, yes, I don't see how that can make a particle of difference.

WITNESS.—Shall I answer?

Q. Yes. A. You are speaking of 1909?

Q. Yes.

A. In 1909, I had made a change in our administration, had asked Mr. Taylor to take our affairs over. May I go on further?

Q. Yes, just tell about the dividends.

A. In July, 1909, I went to the bank; I had been east in 1909, and returned in April, and before that I had turned our affairs over to Fred Stadtmuller, who took it over, and everything was all settled; and when I returned in 1909, in July—Fred Stadtmuller, of course, noticed how the stock was standing—may I say this, may I go on with my story?

Q. I think so.

Mr. CHENEY.—Subject to the same objection, if the Court please.

The COURT.—Yes.

WITNESS.—Fred said, "Auntie, I think you had

(Testimony of Mrs. W. O'H. Martin.)

better come over to the bank, I think you had better have that stock transferred; that stock is yours, or your children's and you had better come over."

Mr. PARTRIDGE.—(Q.) Was Mr. Stadtmuller at that time connected with the bank in any way?

A. Oh, yes, he was assistant [67] cashier, I think, or second assistant cashier.

Q. Was he a director then, do you know?

A. No, he was not a director.

Q. Just go on and tell us what happened regarding the dividend.

A. He came over and sat on the porch, and said "Auntie, I think you had better come over and attend to your stock; that stock is still standing in Harry's name, and his creditors know it is in his name; of course the stock is yours." I could not go that very moment, but I went over the next morning, and I saw Mr. Bender inside; I went over and said, "Mr. Bender, I would like to have that stock transferred; that stock is ours, you know it is ours, Mr. Mapes knows it is ours, and I would like to have it transferred." Mr. Bender says, "Mrs. Martin, I could not transfer it, but if you get two-thirds of the board you can have it transferred—that was before the new banking law came in. So it was not transferred; and Mr. Bender at the same time—it was in July—had a dividend check in his hand made out in my son's name, and was going to send it to Tonopah, and I said, "Don't send that to Tonopah, the stock is ours, it is not Harry's, you know that, because I had advanced, or had given or transferred to him

(Testimony of Mrs. W. O'H. Martin.)

some of the stock." So Mr. Bender didn't say a word. After Fred Stadtmuller met me on the porch at noon, and he said—I am getting ahead of my story—I think that same day he telephoned, he says, "Auntie, that check is on your desk, Mr. Bender has put the check in your desk," so I endorsed it.

Q. Will you look at that check, dividend Number 34, dated July 15th, 1909? (Hands check to witness.) A. That is my writing.

Q. Whose endorsement is that on the back of it?

A. That is mine.

Q. I want to make it clear, Mrs. Martin, as to whose handwriting the entire endorsement is in?

A. It is mine.

Mr. PARTRIDGE.—I offer this in evidence, and ask it be marked Plaintiffs' Exhibit No. 3. (Reads:) [68]

Plaintiffs' Exhibit No. 3—Check, July 15, 1909, on Washoe County Bank.

"Washoe County Bank. Reno, Nevada, July 15, 1909. No. 2279. Pay to the order of H. M. Martin \$300.00 Three Hundred Dollars. Dividend No. 34." Signed "C. T. Bender, Cashier." "Endorsed H. M. Martin, Estate of W. O'H. Martin, Inc., by Louise W. Martin, Pres." and marked "Paid."

(The check is marked Plaintiffs' Exhibit No. 3.)

Mr. CHENEY.—I desire to note objection that this is subsequent to the time when the indebtedness arose for which the bank claims its lien, and that any action of the secretary or the cashier of the bank in

(Testimony of Mrs. W. O'H. Martin.)

delivering a check to a person other than the payee, is not binding upon the bank, and constitutes no notice or knowledge or waiver of the bank's lien upon this stock.

The COURT.—That will be admitted subject to the objection.

Mr. PARTRIDGE.—(Q.) I hand you, Mrs. Martin, the next dividend check, dated the 15th of January, 1910, No. 35, and ask if you know in whose handwriting the endorsement is on that check?

A. That is Fred Stadtmuller's.

Q. All of it? A. Yes.

Q. That is all in his handwriting?

A. Yes, all in his handwriting.

Q. Without the stamp?

A. Without the stamp.

Q. At that time was Mr. Stadtmuller connected with the estate of W. O. H. Martin, in any way?

A. No, he was not. What year was that?

Q. January 15th, 1910.

A. Oh, you mean with the bank or with our estate?

Q. With the estate? A. Yes, he was.

Plaintiffs' Exhibit No. 4—Check, January 15, 1910.

Mr. PARTRIDGE.—I offer this check in evidence, and ask that it be marked Plaintiff's Exhibit No. 4. It is a similar dividend check, made to H. M. Martin, dated January 15th, 1910. It is endorsed H. M. Martin per Estate of W. O'H. Martin, Inc., Assignee, Fred Stadtmuller, Agent." There is a further endorsement, "Pay [69] Washoe County

(Testimony of Mrs. W. O'H. Martin.)

Bank, Reno, Nevada, or order, Estate W. O'H. Martin, Inc."

The COURT.—If there is no objection, that will be admitted, with the same limitation as the other.

Mr. CHENEY.—Same objections.

(The check is marked Plaintiffs' Exhibit No. 4.)

WITNESS.—Mr. Partridge, could I ask you what time was that check drawn?

Mr. PARTRIDGE.—That was in January, 1910.

A. I was not in Reno, then, you see, and Fred endorsed those checks, I was not there.

Q. You were away from Reno at that time?

A. Yes.

Q. I will hand you the next dividend check, dated July 13th, 1910, and ask you in whose handwriting the endorsement on that check is?

A. That is my handwriting.

Mr. PARTRIDGE.—I will offer that in evidence, and ask that it be marked Plaintiffs' Exhibit No. 5.

Plaintiffs' Exhibit No. 5—Check.

The COURT.—It will be admitted in the same way.

Mr. PARTRIDGE.—The check is similar, if your Honor please, and is endorsed "H. M. Martin, by Louise W. Martin, Pres. Estate of W. O'H. Martin, Inc., Owner."

Mr. CHENEY.—I would like to make, if the Court please, the additional objection to this last check, that the endorsement is a self-serving declaration, made after the time that Mrs. Martin had demanded the transfer of the stock from Mr. Bender,

(Testimony of Mrs. W. O'H. Martin.)

and the transfer had not been made.

The COURT.—That simply goes to the endorsement?

Mr. CHENEY.—That goes to the endorsement, and I presume that is the only purpose for the introduction, is the endorsement, because the checks, on their face, were all payable to H. M. Martin.

Mr. PARTRIDGE.—That is not the sole purpose of it; the [70] check is offered not only for the endorsement, but the fact that the dividend was paid after Harry Martin became indebted to them, and we will show after, as a matter of fact, it was clear the indebtedness could not be collected from Harry Martin.

The COURT.—I will admit it subject to the objection, just as I have other testimony of the same kind, and it can be argued later. As I understand, this testimony goes to the vital issue of the case, if I excluded all this testimony, you would be out of court.

WITNESS.—Could I ask you this question, why I endorsed those checks?

Mr. PARTRIDGE.—We will get to that later, Mrs. Martin. I would like to finish with the checks first.

(Check dated July 13, 1910, is marked Plaintiffs' Exhibit No. 5.)

Q. I now hand you the next dividend check, dated January 14th, 1911, and ask you in whose handwriting that endorsement is? A. That is mine.

Q. That is entirely in your handwriting, is it?

(Testimony of Mrs. W. O'H. Martin.)

A. Everything.

Mr. PARTRIDGE.—I offer this in evidence and ask that it be marked Plaintiffs' Exhibit No. 6.

Plaintiffs' Exhibit No. 6—Check, January 14, 1911.

Mr. CHENEY.—Same objection.

The COURT.—Same ruling.

Mr. PARTRIDGE.—The check is dated January 14, 1911, and is endorsed "H. M. Martin, per Louise W. Martin, Pres. of Estate of W. O'H. Martin, Inc., Owner."

(Check is marked Plaintiffs' Exhibit No. 6.)

A recess is taken at 12 o'clock until 1:30 P. M.

AFTER RECESS—1:30 P. M. [71]

Mrs. W. O'H. Martin, Resuming in Direct Examination.

Mr. PARTRIDGE.—(Q.) Mrs. Martin, I will go back for a moment now, still referring to the dividends on these shares of stock, and I will hand you dividend check of January 19, 1904, and ask you in whose handwriting the endorsements are?

A. Well, the first signature is my son's signature, and the other is mine.

Q. That is in your handwriting? A. Yes.

Mr. PARTRIDGE.—We offer it in evidence, and ask that it be marked plaintiffs' exhibit next in order, which will be number 7.

Same objection and same ruling.

Plaintiffs' Exhibit No. 7—Check, January 19, 1904.

Mr. PARTRIDGE.—I will read only the endorsement, which is that of H. M. Martin, and under it is

(Testimony of Mrs. W. O'H. Martin.)

“Pay to the Estate of W. O'H. Martin, Inc., by Louise W. Martin, President.” And there is a stamped endorsement, “Pay to the order of Washoe County Bank, Reno, Nevada, The Nevada National Bank of San Francisco. Geo. Grant, Cashier.”

Q. Do you know where that check was deposited, Mrs. Martin?

A. That must have been deposited in the Nevada National Bank.

Q. In San Francisco? A. Yes.

Q. Do you remember whether it was done by yourself or not?

A. By myself, I think; I am pretty certain I deposited all those checks.

(Check dated January 19, 1904, is marked Plaintiffs' Exhibit No. 7.)

Q. I hand you the next dividend check of July 13, 1904; in whose handwriting are the endorsements on that?

A. Harry M. Martin, and my own endorsement.

Plaintiffs' Exhibit No. 8—Check, July 13, 1904.

Mr. PARTRIDGE.—It is endorsed “H. M. Martin, Estate of W. O'H. Martin, Inc., by Louise W. Martin, President.” I offer it, and ask that it be marked next in order.

(The check is marked Plaintiffs' Exhibit No. 8.)

[72]

The COURT.—You might hand all those checks to the witness and offer them all together. I presume it will be the same objection to each one.

Mr. PARTRIDGE.—I will do that, your Honor.

Plaintiffs' Exhibit No. 9—Check, July 12, 1905.

(Q.) That particular check, referring to the one of July 12, 1905, that is your handwriting?

A. That is my signature.

Mr. PARTRIDGE.—The same offer.

(The check is marked Plaintiffs' Exhibit No. 9.)

(Q.) I hand you a number of dividend checks, one dated July 11, 1906, one July 10, 1907, January 15, 1908, and January 15, 1909, and ask you in whose handwriting the endorsement to those checks are?
(Hands to witness.)

A. One is my son's, and the other is Mr. Taylor's.

Plaintiffs' Exhibit No. 10—Check, July 11, 1906.

Q. On the check of July 11, 1906, the first endorsement is that of your son, Harry Martin, and the other, "Deposit Estate W. O'H. Martin, by Geo. H. Taylor," is by Mr. Taylor, is it? A. Yes.

Mr. PARTRIDGE.—The same offer in regard to that.

(The check is marked Plaintiffs' Exhibit No. 10.)

The COURT.—Is there any question that those checks were signed by the parties by whom they purport to have been signed?

Mr. PARTRIDGE.—Not that I know of. Some of them where the name Harry Martin purports to have been signed by him, but these that we have gone over are all signed by Harry M. Martin.

Q. Those checks that I have handed you, Mrs. Martin, in whose handwriting are the endorsements? A. This one is Harry's and Mr. Taylor's.

(Testimony of Mrs. W. O'H. Martin.)

Plaintiffs' Exhibit No. 11—Check, July 10, 1907.

Q. That is referring to the check of July 10, 1907, the endorsement is by H. M. Martin, and then by Mr. Taylor? A. Yes.

Q. By the way, at this point I want to ask you whether or not this is the same Mr. Taylor whom you testified was present as assistant [73] cashier of the bank at the time this transfer of stock was made? A. The same gentlemen, yes.

(Check of July 10, 1907, offered in evidence, and marked Plaintiffs' Exhibit No. 11.)

Q. Now, the remaining three checks, the endorsements are in whose handwriting?

A. Mr. Taylor's; these were endorsed at a time when I was not here.

Plaintiffs' Exhibit No. 12—Recital Re Check Dated January 15, 1908, and July 15, 1908.

Mr. PARTRIDGE.—I will offer in evidence these checks, dated January 15, 1908, July 15, 1908, and January 15, 1909. They are all endorsed in the handwriting of Mr. Taylor "Deposit Estate W. O'H. Martin, Incp. H. M. Martin by Geo. H. Taylor."

(The three checks are marked Plaintiffs' Exhibit No. 12.)

Plaintiffs' Exhibit No. 11—Recital Re Check Dated January 11, 1905, and July 13, 1903.

Q. Here are two checks, one dated January 11, 1905, one July 13, 1903, whose is the signature upon the endorsement of those two checks?

(Testimony of Mrs. W. O'H. Martin.)

A. Harry Martin on both of them.

(The two checks are offered in evidence and marked Plaintiffs' Exhibit No. 11.)

Q. Now, the remaining three checks, the endorsements are in whose handwriting?

A. Mr. Taylor's; these were endorsed at a time when I was not here.

Plaintiffs' Exhibit No. 12—Check.

Mr. PARTRIDGE.—I will offer in evidence these checks, dated January 15, 1908, July 15, 1908, and January 15, 1909. They are all endorsed in the handwriting of Mr. Taylor "Deposit Estate W. O'H. Martin, Inc. H. M. Martin. By Geo. H. Taylor."

(The three checks are marked Plaintiffs' Exhibit No. 12.)

Plaintiffs' Exhibit No. 13—Recital Re Check Dated January 11, 1905, and July 13, 1903.

Q. Here are two checks, one dated January 11, 1905, one July 13, 1903, whose is the signature upon the endorsement of those two checks?

A. Harry Martin on both of them.

(The two checks are offered in evidence and marked Plaintiffs' Exhibit No. 13.) [74]

Plaintiffs' Exhibit No. 14—Recital Re Check Dated January 10, 1906.

Q. Handing you a check of January 10, 1906, is that the signature of your son and of Mr. Taylor?

A. Yes, my son and Mr. Taylor.

Mr. PARTRIDGE.—The same offer.

(The check is marked Plaintiffs' Exhibit No. 14.)

(Testimony of Mrs. W. O'H. Martin.)

**Plaintiffs' Exhibit No. 15—Recital Re Check Dated
January 9, 1907.**

Q. Handing you check of January 9, 1907, is that the signature of your son, H. M. Martin?

A. Yes.

Q. And the word "Account" Estate W. O'H. Martin? A. Is Mr. Taylor's.

Mr. PARTRIDGE.—Same offer in regard to that. (The check is marked Plaintiffs' Exhibit No. 15.)

After July 15, 1911, I received no further dividends on this stock. After the transfer of the stock to Harry Martin, and prior to January 15, 1909, the dividend checks were sent to Harry Martin at Tonopah, and after a week or two Harry endorsed them and sent them to me at Reno. I endorsed them in the name of the Estate of W. O'H. Martin, Inc., by Louise W. Martin, Pres., and took them to the bank and deposited them. I could not say to whom I gave them at the window. Probably Mr. Bender may have been at the window once in awhile, but they were taken to the bank and deposited. At the time that I told some of the gentlemen of the bank that the stock ought to be transferred. The first dividend check that I received Mr. Bender was on the point of sending to my son, and I said: "Mr. Bender, please don't send that check. That stock is ours." And in the afternoon Mr. Stadtmuller told me that the check was on my desk and that Mr. Bender had left it there. It was endorsed by my son, because he had not received it. I endorsed it in the name of the Estate, by

(Testimony of Mrs. W. O'H. Martin.)

Louise W. Martin, and gave it to the bank to the credit of the Estate. After that time and up to July, 1911, these dividend checks together with the other check for our two hundred and fifty (250) shares came through the mail to my box at the post-office. One was made out for \$1,500 and the other was made out for \$300, and they were both sent, together, [75] to the Estate of W. O'H. Martin. The letters were addressed, "Estate of W. O'H. Martin, Inc., Reno, Nevada." This court of dealing applies to all of the checks that subsequent to January are endorsed either by myself or by Mr. Taylor.

Q. Now, Mrs. Martin, you testified this morning that you requested the officials of the bank to make that transfer; can you recollect what month in 1909 that was?

A. I think I had been east that year; I think it was the month of July, just before the dividends were paid.

Q. And to whom did you speak about the matter at that time? A. At that time?

Q. Yes.

A. Well, that was about the same time that I received that check that Mr. Bender didn't send to Tonopah; he was right inside of the railing, and I asked Mr. Bender, told him I would like to see him about this matter of transferring the stock to the estate, to whom it rightly belonged, and Mr. Bender, said, "Mrs. Martin, I can't transfer it myself, but if you will bring it before the board, or get two-

(Testimony of Mrs. W. O'H. Martin.)

thirds of the vote of the board, we probably could transfer it," and that went right on for a long time before anything was done.

Q. In regard to that occasion when you spoke to Mr. Bender, did Mr. Bender in anywise deny that it was the stock of the estate? A. No.

Mr. DOWNER.—This is objectionable, and we move to strike out the answer, because they allege in their complaint the demand was made some time in the year 1911. We are not called upon to meet a demand made in 1909, because plaintiffs don't bring it in their case at all. We are here to meet simply the allegations of the complaint, and there is no allegation that any demand was made until 1911 by the complaints in this case.

Mr. PARTRIDGE.—The evidence is not offered for the purpose of showing a demand, that we will establish at the time we allege, namely, in July, 1911; but the testimony is offered for the [76] purpose, and sole purpose, of showing that as early as July, 1909, at least that officer of the bank knew that it was the stock of the Martin Estate Company, and that when Mrs. Martin stated to him that it was the Estate's stock, he did not say that it wasn't.

The COURT.—I will admit the testimony. I suppose it may be admitted in the same way as the other, it all goes to the same issue.

Mr. CHENEY.—Subject to the objection, I understand.

The COURT.—Subject to the objection.

(Testimony of Mrs. W. O'H. Martin.)

(By direction the reporter reads the last question.)

Mr. CHENEY.—That is objected to on the ground it is leading.

Mr. PARTRIDGE.—Well, it is. I will withdraw it.

Q. Did Mr. Bender say anything else in regard to that stock, except what you have already testified to?

A. Yes, he did say something else; I wanted that stock transferred, and he went to—I think he had a blank certificate, and he showed me the words that were written on the back, the agreement if anybody was indebted to the bank, why, that stock could not be transferred. Of course we were not indebted to the bank. He said of course he could not do it alone, but it could be brought before the board; and time went on, and nothing.”

After the talk with Mr. Bender, and during the month of September, or the end of August, I had a talk with Mr. Taylor and asked him if anything had been done in regard to the transfer of the stock, and he said that it had not, but that he thought it would be advisable to write a letter to the board, which I did.

During all these negotiations, and up to July, 1911, neither the bank nor any official communicated to me a refusal to transfer the stock.

During the years 1908 and 1909 Mr. Taylor was keeping the books [77] for the Martin Estate Company, taking care of our estate, and was also

(Testimony of Mrs. W. O'H. Martin.)

assistant cashier of the Washoe County Bank. I don't think he was a director then.

Q. Mrs. Martin, do you remember one evening at your house when Mr. Taylor came there, and when your son Carl was present, having a conversation at that time and place in the presence of your son Carl, with Mr. Taylor with reference to this stock? A. I do.

Q. Will you relate what was said?

Mr. DOWNER.—One moment—I would like to have the date, as near as you can give it.

A. September.

Mr. PARTRIDGE.—(Q.) That was in September, 1909? A. Yes.

Q. Will you relate what that conversation was?

Mr. DOWNER.—We object on the ground that there is no showing that Mr. Taylor was such an official of the bank that any notice was imputed to the bank through him.

The COURT.—That objection will be noted, and the testimony will be admitted subject to the objection. I suppose that will apply to some other questions, too?

Mr. DOWNER.—Probably.

Mr. CHENEY.—Of course that objection has been made several times.

Mr. DOWNER.—That objection has been made; it applies to other matters, and it has been saved before.

The COURT.—It has been saved before, that was this morning some time. It all goes in, but of

(Testimony of Mrs. W. O'H. Martin.)

course I would like to know what your objections are; it is only fair to the other side that they should know just what your objections is. If, Mr. Partridge concluded that the objection was good, he might be in a position now to correct it. [78]

Mr. PARTRIDGE.—I understand, gentlemen, your objection to communications to Mr. Taylor's statements is based upon the proposition that he was not such an officer of the bank that communications made to him would be notice to the bank, nor would his admissions bind the bank; is that correct?

Mr. CHENEY.—Also on the proposition that Mr. Taylor at that time, especially at the time of the last communication, occupying a position of confidence and trust with the Martin Estate as its agent, is not presumed to have communicated the business of his principal to the Washoe County Bank, because such a communication by him would be in violation of his duty to the Martin Estate Company.

The COURT.—This objection does not apply to Mrs. Martin's testimony with reference to these signatures, or the endorsement that was made by Mr. Taylor while Mrs. Martin was away from Reno, does it?

Mr. CHENEY.—Oh, no, because that only went to the genuineness of his signature; there is no controversy about that.

The COURT.—Do I understand those checks were offered to show notice also?

Mr. PARTRIDGE.—Oh, yes, your Honor; that was one of the main objects.

(Testimony of Mrs. W. O'H. Martin.)

Mr. DOWNER.—They were offered under objection, and at the same time Mrs. Martin herself stated—which brings it within the objection now made by Judge Cheney, as I understand it—that Mr. Taylor was acting for the Martin Estate at the time he endorsed those checks; so we certainly desire to have the objections go to the entire testimony concerning Mr. Taylor, either by conversations with him, or by alleged endorsements that he is supposed to have made.

Mr. PARTRIDGE.—That is only fair, and I consent it be considered that objection was made to the endorsements. [79]

Mr. CHENEY.—May it be considered that any testimony offered in reference to conversations between any of the representatives of the Martin Estate and Mr. Taylor, be subject to this same objection.

Mr. PARTRIDGE.—That is, any that have been so far offered; I don't like to admit that for the future, but to the past I consent that objection be made. It is understood that we consent to that.

Mr. CHENEY.—Hereafter we will make our specific objections. (By direction the reporter reads the last question.)

WITNESS.—In the year 1909?

Mr. PARTRIDGE.—Yes.

A. Well, I telephoned to Mr. Taylor that I wanted to see him at the house, and he came over—this worried me in the start, and he came over, and I approached him, and I said, Mr. Taylor—I think I have repeated this, haven't I?

(Testimony of Mrs. W. O'H. Martin.)

Q. Not this particular conversation you have not.

A. When my son Carl was present?

Q. Yes.

A. Well, it was to this effect, Carl spoke up first, and he said, "Mr. Taylor, why don't they transfer that stock to the estate, that stock belongs to us, you know it belongs to us, and the bank directors know it belongs to us," then he went on to say that I should—No, he told me—we discussed this—I have repeated this before, haven't I, about this discussion in 1909?

Q. No, for your information, gentlemen, I will remind her; do you remember his saying anything about what he had told the directors about it?

A. Yes, I do—I have gotten back again.

Mr. CHENEY.—I object to that on the ground it is incompetent, and irrelevant; that what he may have told the directors unless it was when the board of directors were present and assembled in considering this matter, is not notice to the bank; and it is not shown that Mr. Taylor at the time of making these statements, either to Mrs. Martin or the purported statements to the board of directors, was in a position to represent, or that notice to him constituted [80] notice to the bank.

The COURT.—It will be the same ruling.

WITNESS.—I may go on?

Mr. PARTRIDGE.—Yes, go ahead.

A. We were sitting there, and Carl said, "Mr. Taylor, why doesn't the bank transfer that stock? They know that stock is ours, and why do they bother mother so much about it?" Mr. Taylor

(Testimony of Mrs. W. O'H. Martin.)

turned around and said, "I know that stock is yours, Mrs. Martin, but I cannot transfer it alone." And so he said he would of course bring it before the board, what was to be done; that was in 1909. And, as I said, Carl had said that he knew the stock was ours, and I knew the stock was ours, but could not have it transferred; and he said this, too, that night, if it ever came to a lawsuit, he would have to testify for the W. O'H. Martin Estate—that night he said it."

Cross-examination.

At the time Mr. Harry Martin was elected a director of the bank in February, 1903, he filled a vacancy left by the death of Mr. D. V. Lyman. I had talks with four different members of the Board about Harry filling Lyman's place. In my talk with Mr. Rowland and the others, they all expressed approval of Mr. Harry Martin. They explained to me that Harry would have to have some stock to be represented on the Board. I do not remember that they told me the precise amount.

Q. Did Mr. Rowland or Mr. Mapes, the two with whom you talked who are now living, ever give you to understand in any way, Mrs. Martin, that Mr. Harry Martin could be a director of the bank unless he owned stock?

A. They never gave me to understand at all, only that he must be represented on the books." We had two hundred and fifty (250) shares in one certificate and fifty (50) in the other, and I turned over

(Testimony of Mrs. W. O'H. Martin.)

the fifty share certificate to Harry Martin for convenience. [81]

Q. That is, your stock at that time stood one certificate for two hundred and fifty shares, and one at fifty, and it was convenient to take the one and transfer it to Harry Martin?

A. Yes, I was stupid about it.

Q. And if it had not been for the fact that the shares were in those amounts, two hundred and fifty and fifty shares—the certificates—you would have simply given Mr. Harry Martin, as you say, sufficient to have qualified him to act as a director in the bank, would you?

A. That is all, yes. I should never have given up the two hundred and fifty shares to qualify, but that fifty shares was there, and—"

At the time of the transfer of the fifty shares of stock to Harry Martin there were present Miss Anne Martin, myself and Mr. George Taylor. After Harry put his name on the back of the certificate I took it.

Q. How was it endorsed, and state what was done at the time of its endorsement?

A. It was endorsed just across the back, "Harry M. Martin," in the presence of Mr. Taylor.

Q. Then what was done with it?

A. I deposited it in our box.

Q. It was given to you, was it? A. Yes.

Q. By whom?

A. Given to me by my son after he endorsed it.

(Testimony of Mrs. W. O'H. Martin.)

Q. And you took it and put it in the safe deposit box?

A. I took it and put it in the safe deposit box."

Q. What is the reason if he ceased to be a stockholder, or didn't own that stock, you didn't immediately have the secretary of the company issue a new certificate for those fifty shares?

A. Because I had talked to Mr. Taylor about it several times, and Mr. Taylor had said that it was fully endorsed, and that it was all right as it was.

Q. You knew then that it was necessary for certificates to [82] stand in the name of Mr. Harry Martin in order to qualify him as a director, did you?

A. Mr. Mapes told me that, yes.

Q. And therefore, as I understand, you made a transfer of stock to him, not as owner at all, but simply to permit certificates to stand in his name in order to qualify him as a director?

A. That was the object. Mr. Martin died September 14, 1901, and Harry Martin removed from Reno to Tonopah in 1904, and after that time we continued to keep this fifty shares of stock in our safe deposit box."

July, 1909, was the first time I asked for a transfer of these shares of stock. I waited all that time because Mr. Taylor had told me that the stock was fully endorsed. I have letters to that effect, and it was left that way, and I thought it was perfectly safe as it was.

(The witness' attention is directed to a check

(Testimony of Mrs. W. O'H. Martin.)

dated July 14, 1903, attached to Plaintiffs' Exhibit No. 13.)

"This check is made payable to the order of H. M. Martin by him and by nobody else." I got the money on this check. I must have intended to endorse it when the check was given. I did not endorse it, but it was paid. I am not mistaken in the fact that I got the money on that. I received every check from that time until 1911.

(Witness' attention is directed to a check dated July 11, 1905, attached to Plaintiffs' Exhibit No. 13.)

I got the money on this check.

(Witness' attention is here directed to the Plaintiffs' Exhibit No. 4, and check dated January 15th, 1910.)

Fred Stadtmuller, who is my nephew, at that time had charge of our affairs. I do not know why Fred Stadtmuller endorsed this check as assignee. I have attended several meetings of the stockholders of the Washoe [83] County Bank since July, 1903, as representative of the Martin Estate Company. I do not remember what occurred at the meeting of July 14, 1903, nor what occurred at the meeting of the stockholders on August 9, 1904, nor what occurred at a meeting of the stockholders on July 1, 1905, nor what occurred at a meeting of the stockholders on July 10, 1906. As to the stockholders' meeting of July 9, 1907, I do not remember who represented the fifty shares of stock at that meeting. I think Mr. Taylor may have had the proxy. I have no recollection of what occurred at the meeting of July 14,

(Testimony of Mrs. W. O'H. Martin.)

1908. The Martin Estate Company was not represented at that meeting. At the meeting of July 13, 1909, I had a proxy for H. M. Martin.

Q. Do you remember a meeting of July 12, 1910?

A. 1910, I was not in Reno.

Q. July 12, 1910? A. No, I was in California.

Q. On July 12th; then it is not true that at that time the Martin Estate was represented by Mrs. Martin, 250 shares, and that the fifty shares in the name of H. M. Martin was represented by Martin Estate proxy?

A. Mr. Taylor must have had that stock, both of the proxies, because I was not in Reno at that time, I was in California in 1910.

Q. You were not here?

A. No, I was not here.

Q. Then you were not present at that meeting?

A. No. As far as I can recollect, Mr. Stadtmuller attended the stockholders' meeting of July 11, 1911. I never heard before that the stockholders only allowed Mr. Stadtmuller to vote 250 shares at that meeting.

As to the conversation between myself and Mr. C. T. Bender, in July, 1909, I asked Mr. Bender if that stock could not be transferred, and he said he would like to do it, but I would have to get a two-thirds' vote of the Board. He told me that Mr. Harry Martin was [84] indebted to the bank, and he said that the reason why the bank would not transfer the stock was because it stood in Harry Martin's name, and I replied, "Mr. Bender, that stock is not

(Testimony of Mrs. W. O'H. Martin.)

Harry's, and you know that stock is not Harry's. You know that stock belongs to the Estate." Mr. Bender made no reply to this. He did not say, "Mrs. Martin, you are mistaken. I never knew any such thing, and the stock was always Mr. Harry Martin's." I did not know that my son, Harry, was indebted to the bank until I sent Mr. Taylor to Tonopah in January or February, 1909. I never knew my son was indebted to the bank until I had sent Mr. Taylor out to Toonpah, that was in 1909; I sent Mr. Taylor out there at my expense; I didn't know the condition of my son's business; we were interested in that business, and I was a little anxious about it, and Mr. Taylor went out, and he brought back figures; and after he returned he told me my son was indebted to the bank; that was the first time I ever knew that the bank had an indebtedness against him, in 1909. I think Mr. Taylor told me the amount of the indebtedness was \$17,000.00 and that no interest had been paid.

Q. There was one thing I omitted about the conversation with Mr. Bender in July, 1909, Mrs. Martin; you said something about Mr. Bender reading you something that was on the certificate?

A. Oh, he read something about the endorsement, anybody that held stock in the bank, if they were indebted to the bank, the stock could not be transferred; and he even told me that Mr. Martin had had that put on the back of the certificate, and I said, "Mr. Bender, that is all right to people who are owing you, but as long as this stock is ours, and we

(Testimony of Mrs. W. O'H. Martin.)

don't owe, that does not affect me at all," that was the conversation—he brought out a blank certificate, that was all."

The only reason why I permitted the stock to stand on the books of the [85] bank in Harry Martin's name was to qualify him as a director.

The reason that I did not have the stock re-transferred when Harry ceased to be a director was because I was told the stock was perfectly safe as it was. Mr. Taylor had always told me it was just as safe that way.

Testimony of Mr. Harry M. Martin, for the Plaintiffs.

HARRY M. MARTIN, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination.

I reside in San Rafael, California, and am a son of Mrs. Martin. I recollect the transfer of stock which took place in the director's room of the Washoe County Bank. There were present my mother, my sister Anne Martin, and Mr. Taylor. In the presence of Mr. Taylor this certificate for fifty shares was given to me, and I endorsed it and returned it to my mother. Excepting during the time of the meeting the certificate was never at any time in my possession. I was elected a director at the next regular monthly directors' meeting. I remained a director until 1905. During the years I acted as a director, I received *I received* dividend checks on the fifty

(Testimony of Harry M. Martin.)

shares of stock which I endorsed and either gave them to my mother for the estate, or mailed them to her. I never received any money on these dividend checks. After I ceased to be a director I went to Tonopah—this was in May or June, 1905—and engaged in business in mining supplies. I bought 49% of the capital stock of the Nye County Mercantile Company, a corporation. While I was in Tonopah I received dividends on the fifty shares of stock, which I mailed to the Estate of W. O'H. Martin.

I remember writing to Mr. Taylor, of the Washoe County Bank about a loan. He was Assistant Cashier of the Bank at that time, and in this letter I told the bank that I would like to borrow a certain sum of money with my security of the stock of the New County Mercantile [86] Company. I think I asked for a loan of \$20,000 and received an answer from Mr. Taylor, who told me it would be satisfactory. I drew a check on the Bank for that amount, and endorsed and sent with the check my stock in the Nye County Mercantile Company.

(The witness is here shown Certificate No. 20 of the Nye County Mercantile Company.)

That is the Certificate of Stock to which I refer. The endorsement on the back "H. M. Martin" is my signature.

WHEREUPON Plaintiffs' Exhibit No. — was admitted in evidence and read as follows:

STATEMENT BY MR. PARTRIDGE.—"I will now, with your consent, read the entire certificate. It is Certificate No. 20 for 479 shares of stock of the

(Testimony of Harry M. Martin.)

Nye County Mercantile Company, of Tonopah, Nye County, Nevada, in the name of H. M. Martin. Par value \$100 a share, and endorsed by H. M. Martin. The date of the certificate is September 22, 1905.”

(Defendants’ counsel then produced a note of H. M. Martin for the sum of money borrowed by him.)

WHEREUPON the said note was admitted in evidence and marked “Plaintiffs’ Exhibit No. —, and read as follows:

**Plaintiffs’ Exhibit No. —, Certificate of Stock No.
20 of Nye County Mercantile Co.**

“\$20,451.64.

“Tonopah, Nevada, January 15, 1909.

“One day after date, without grace, for value received, I promise to pay to Washoe County Bank, Reno, Nevada, at its banking office in Reno, Nevada, or wherever payment shall be demanded in the State of Nevada, California, or elsewhere, at the option of the holder hereof, \$20,541.64; in United States Gold Coin; with interest in like gold coin, payable monthly, at the rate of 7 per cent per annum from date hereof until paid. The makers and endorsers hereof waive demand, protest, notice and diligence, and I further promise that if this note is not fully paid at maturity, I will pay all costs and expenses, [87] including a reasonable attorney’s fee, that may be incurred in collecting this note, or any part thereof.

“H. M. MARTIN.”

The number I cannot make out. I will omit that; I suppose it is of no consequence.

(Testimony of Harry M. Martin.)

“Having executed and delivered to the Washoe County Bank, Reno, Nevada, a promissory note, dated January 15, 1909, for the sum of \$20,451.64, due January 16, 1909, payable to the order of said bank, and for said note and all other indebtedness to said bank now existing, or which may hereafter arise, or which now or may hereafter become liable as principal, debtor, or otherwise, do hereby pledge, transfer, and deliver to said bank the following securities, to wit: Certificate No. 20 for 479 shares of the capital stock of the Nye County Mercantile Company. Said bank shall not be liable for failure to collect said securities, nor for failure to present, protest, give notice, or sue thereon, but shall only be liable for what it actually collects or received on the same. In case the securities herewith pledged, or which may hereafter be pledged, shall become or be depreciated in value, on demand from said bank or holder of said note, I agree to make payment on said indebtedness, or deposit additional securities to the satisfaction of said bank or holder. Default in the payment of said indebtedness hereby secured, or failure to make payment or deposit additional security, as above provided, shall at the option of said bank at once mature all indebtedness secured hereby, and upon such default said bank is authorized and empowered, with or without notice to me or the public, to sell at private or public sale, the whole or any part of the aforesaid securities, and to deliver the same to the purchaser or purchasers thereof. At such sale [88] said bank may become the purchaser of

(Testimony of Harry M. Martin.)

the whole or any part of said securities, without any right of redemption on my part. The proceeds of such sale shall be applied first to the payment of all costs and expenses herein incurred, then to the payment in part or whole of any indebtedness hereby secured; said bank to have option of application. Any surplus left shall be paid to me. If the proceeds of such sale are not sufficient to pay all indebtedness hereby secured, I agree to pay balance on demand.

H. M. MARTIN.”

I think that I borrowed this money in October, 1906. The value of the Nye County Mercantile Company stock at that time was from \$75,000 to \$100,000. With the money that I borrowed I bought more stock in the Nye County Mercantile Company. The value of the stock increased until October, 1907, the month of the panic. The net value of the business of the Nye County Mercantile Company was something over \$250,000 on the first of June, 1907. Referring back to the 50 shares of stock which were transferred into my name, I paid nothing for that stock.

(The testimony of H. M. Martin as to what took place between himself and Mr. Taylor in reference to a loan from the Washoe County Bank or giving security therefor was admitted subject to the objection of the defendants that it was not competent evidence as against the bank because it was not shown that the same was ever brought to the attention of the bank or to any one authorized to represent the

(Testimony of Harry M. Martin.)

bank, and that it is wholly immaterial whether the bank did or did not accept any security for this loan as the acceptance of such security did not in any way constitute a waiver of the bank's lien upon the stock which stood in Harry M. Martin's name.)

Cross-examination.

[89]

I was appointed a director of the Washoe County Bank about February 10, 1903, and qualified at once and acted as a director the first regular meeting subsequent to that date. I attended some of the stockholders' meetings, but I have no recollection of being present at any particular meetings. I could not remember the dates. I think that I acted as proxy for the Martin Estate Company, and that at every meeting I attended I represented and voted the 50 shares of stock which stood in my name. To my best recollection my mother was not present at any of the stockholders' meetings that I attended. I have never been a member of the Martin Estate Company, although I was more or less familiar with its business affairs until 1905, when I went to Tonopah, as I acted as Secretary and kept its accounts. Mr. Taylor succeeded me in that position, and after Mr. Taylor, Mr. Stadtmuller. The Martin Estate Company exercised ordinary business discretion in keeping its affairs private. It is possible that I had given a proxy to represent the fifty shares of stock that stood in my name, and if the records of the stockholders meetings of the Washoe County Bank so show, there is no doubt in my mind as to their

(Testimony of Harry M. Martin.)

correctness. I never paid any interest on my loan from the bank. I could have paid it until the panic of 1907, but I was using the money in my business. The bank never received any dividend of the Nye County Mercantile Company's stock. A dividend, however, was paid in 1907 on some stock that my mother had. The dividend declared on the stock transferred to the Washoe County Bank as collateral was credited to surplus account, for the reason that I did not have the money ready at that time, and I planned to pay it later. I am not absolutely sure whether I gave an original note and the renewal in 1909. My recollection is that it was an open account until I gave the note in 1909. From my experience in my father's business and with the Washoe County Bank, I know that it is customary for a bank [90] to refuse to pay money on a check without its being endorsed. While I may have got the money on the two dividend checks containing only my endorsement, the benefit of the money did not accrue to me. It is possible that I actually got the money, but it is improbable, for I think that the check was probably endorsed and deposited by me to the credit of the estate.

When I paid dividends upon stock of the Nye County Mercantile Company to my mother, and did not pay dividends on the stock which was given as collateral security to the Washoe County Bank, I did not notify the bank for the reason that I considered its loan perfectly good. They could have had their money if they had wanted it. I could have

(Testimony of Harry M. Martin.)

paid it at any time until the panic of 1907. My business in Tonopah was foreclosed on a mortgage, and the creditors took it over. This was during the summer of 1911. After the panic of 1907 I did not have the ready cash to pay the bank's note. I would have had to borrow money to pay it. I owned 49% of the stock in the Nye County Mercantile Company, and H. C. Cutting owned 51%. I used the money I borrowed from the Washoe County Bank to buy out Mr. Cutting's interest. I had all the stock, with the exception of some sold to my mother. Immediately after the panic of 1907, the property of the Nye County Mercantile Company was mortgaged to secure its creditors, and that mortgage was afterwards foreclosed and the property sold.

I know Mr. C. T. Bender, and know his signature.

(The witness is here shown a proxy for the annual meeting of the stockholders of the Washoe County Bank for the meeting of July 11, 1905.)

That is Mr. Bender's signature on the proxy, and that is also my signature.

WHEREUPON Defendant's Exhibit No. ——— was admitted in evidence and read as follows: [91]

Defendants' Exhibit No. ———, Proxy for Annual Meeting of Stockholders of the Washoe County Bank for Meeting of July 11, 1905.

“Know all men by these presents, that I “H. M. Martin, do hereby constitute and appoint C. T. Bender my true and lawful attorney for me, and in my name, place and stead, to vote as my proxy at the

annual meeting of the stockholders of the Washoe County Bank, Reno, Nevada, on July 11, 1905. Certificate No. 171, fifty shares, and according to the number of votes to which I would be entitled if personally present, with full power of substitution or revocation.

H. M. MARTIN.”

Witness my hand and seal at Tonopah this 5th day of July, 1905.

H. M. MARTIN.

On the margin is written: “Please fill in name, sign and return. C. T. Bender, Secretary.”

WHEREUPON witness was shown a proxy dated June 10, 1907. The signature of Mr. Bender on this proxy is his, and my signature was written by him.

WHEREUPON Defendant’s Exhibit No. ——— was admitted in evidence and read as follows:

Defendants’ Exhibit No. ———, Proxy Certificate of the Washoe County Bank Dated June 10, 1907.

“Proxy Certificate of the Washoe County Bank,
Reno, Nevada.

Know all men by these presents: That I hereby constitute and appoint C. T. Bender my true and lawful attorney for me and in my name, place and stead, to vote as my proxy at the annual meeting of stockholders of above-named corporation, to be held on ———, or any adjourned meeting, fifty shares of the capital stock, and according to the number of votes to which I would be entitled if personally present, with full power of substitution and revocation. Witness my hand and seal at Tonopah,

Nevada, this 10th day of June, 1907.

[Seal]

H. M. MARTIN.

Witness: J. L. Moore." [92]

Mr. CHENEY.—Upon the back of this certificate:
 "I hereby substitute and appoint Mrs. Louise W.
 Martin under this proxy. C. T. Bender."

(Witness is here shown proxy dated July 1, 1909.)

The signature on this proxy is mine.

WHEREUPON Defendant's Exhibit No. ———
 was admitted in evidence and read as follows:

**Defendants' Exhibit No. ———, Proxy Certificate of
 the Washoe County Bank Dated July 1, 1909.**

"Proxy Certificate of the Washoe County Bank,
 Reno, Nevada.

Know all men by these presents, that I hereby constitute and appoint Estate of W. O'H. Martin, Inc., my true and lawful attorney for me and in my name, place, and stead, to vote as my proxy at the annual meeting of stockholders of the above-named corporation to be held on the ——— or at any adjourned meeting, fifty shares of the capital stock, and according to the number of votes to which I would be entitled if personally present, with full power of substitution and revocation. Witness my hand and seal at ———, July 1, 1909.

H. M. MARTIN. Seal."

(Witness is here shown proxy dated July 2, 1910.)

The signature thereon is my signature.

WHEREUPON Defendant's Exhibit No. ———
 was admitted in evidence and read as follows:

Defendants' Exhibit No. —, Proxy Certificate of the Washoe County Bank Dated July 2, 1910.

“Proxy certificate of the Washoe County Bank,
Reno, Nevada.

Know all men by these presents, that I hereby constitute and appoint Estate of W. O'H. Martin my true and lawful attorney for me and in my name, place and stead, to vote as my proxy at the annual meeting of stockholders of the above-named corporation to be held on July 12, 1910, or at any adjourned meeting of my shares of the capital stock, and according to the number of votes to which I would be entitled [93] if personally present, with full power of substitution and revocation. Witness my hand and seal at Reno, Nevada, the 2d day of July, 1910.

H. M. MARTIN. Seal.”

(Witness is here shown proxy dated July 11, 1911.)

I am acquainted with the signature of my mother, Mrs. Louise W. Martin. The signature on this certificate is here.

WHEREUPON Defendants' Exhibit No. — was admitted in evidence and read as follows:

Defendants' Exhibit No. —, Proxy Certificate of Washoe County Bank, Dated July 11, 1911.

“Proxy certificate of the Washoe County Bank,
Reno, Nevada.

Know all men by these presents, That the undersigned corporation hereby constitutes and appoints

Fred Stadtmuller its true and lawful attorney for it and in its name, place and stead, to vote as its proxy at the annual meeting of stockholders of the above-named corporation to be held on July 11, 1911, two P. M., or at any adjourned meeting, three hundred (300) shares of the capital stock, and according to the number of votes to which it would be entitled if personally present, with full power of substitution and revocation. Witness its hand and seal at Reno, Nevada, the 11th day of July, 1911.

ESTATE OF W. O'H. MARTIN INCORPORATED.

By LOUISE W. MARTIN, Seal.
President.

Redirect Examination.

As to these proxies which have just been introduced in evidence they were sent to me by letter while in Tonopah, and I was asked to fill them in and return them.

(Witness is here shown a Washoe County Bank Deposit Book in the name of the Estate of W. O'H. Martin.)

Referring to a certain dividend check for Dividend #22, dated July 13, 1903, which was endorsed by myself alone, and comparing it with an entry in this Deposit Book of July 20th, 1903, my recollection is refreshed, and I am sure that I deposited that check direct. Yes, I remember vaguely of depositing a check under the circumstances. [94]

Testimony of C. T. Bender, for Plaintiffs.

C. T. BENDER, called as a witness on behalf of plaintiffs, having been duly sworn, testified as follows:

Direct Examination.

I am now, and ever since the organization of the Washoe County Bank have been its Cashier and a Director.

(The witness is here shown the account-book of the Estate of W. O'H. Martin with the Washoe County Bank, and his attention directed to Item, Dividend No. 22.)

This deposit of \$300 is, I believe, in the handwriting of Mr. Froelich, who was formerly a Receiving Teller. Turning to the date of January 18, 1904, "Deposit S. F. \$1800." This entry is also in Mr. Froelich's handwriting.

WHEREUPON Plaintiff's Exhibit No. 16 was admitted in evidence, as far as it shows deposits of dividend checks, and read as follows;

**Plaintiffs' Exhibit No. 16—Deposit of Dividend
Check With Washoe County Bank.**

"Jul. 20, 1903.	Div. #22 H. M. M.....	\$ 300.00
"Jan. 11, 1906.	Dividend	1500.
"Feb. 6, 1906.	Bank Div.	300.
"July 12, 1906.	Div. Bank	1500.
"Aug. 10. 1906.	Bk. Divd. by H. M. M....	300.

Testimony of Mrs. W. O'H. Martin, Recalled for Plaintiffs.

Direct Examination.

On the return of Mr. Taylor from Tonopah in the early months of 1909, nothing was said, nor was anything brought to my attention indicating that the indebtedness of Harry Martin to the bank in any wise affected my stock. It was not until July, 1909 that I learned that there was any question about my stock being transferred. This was when Mr. Stadtmuller called the matter to my attention.

Cross-examination.

When Mr. Taylor went to Tonopah he went at my request, and I paid his expenses. He was in my employ at that time.

Testimony of T. T. C. Gregory, for Plaintiffs.

T. T. C. GREGORY, being called as a witness on behalf of the [95] plaintiffs, having been duly sworn testified as follows:

Direct Examination.

I reside in San Francisco, and am an attorney at law. Mrs. Gregory, one of the plaintiffs, is my wife. In July, 1911, I went to Reno with reference to the stock in controversy here. I talked with both Mr. Mapes and Mr. Taylor and the directors of the bank. I met Mr. Mapes and Mr. Taylor together in the Washoe County Bank. I represented at that time the Estate of W. O'H. Martin. I asked Mr. Mapes to secure the transfer of this stock to the Estate of Martin. I stated that this was a matter which I felt

(Testimony of T. T. C. Gregory.)

the officials of the bank were thoroughly aware of, and I felt that equitably, no matter what the legal rights might be that the stock should be transferred. I urged Mr. Mapes to secure the necessary action on the part of the Board of Directors to procure this transfer. I stated that in my opinion this stock was legally as well as equitably the stock of the Martin Estate corporation, and that I would be glad to submit to the attorneys for the bank some authorities which I had at that time bearing on the subject. Mr. Mapes stated that he would see that the matter was brought up before the directors.

I also appeared before the Board of Directors of the Washoe County Bank, and requested them to cause this stock to be transferred, and they said they would submit the matter to Judge Cheney, or to his firm, for a legal opinion.

(The above testimony of Mr. Gregory was admitted subject to the objection of the defendants that it was incompetent on the ground that it related to conversations had subsequent to the contracting of the liability of H. M. Martin and after the lien of the bank on this stock had attached.)

(The witness is here shown a carbon copy of a letter.)

This is a carbon copy of a letter that I subsequently wrote to the bank.

WHEREUPON a letter from T. T. C. Gregory to the Washoe County [96] Bank, dated August 18th, 1911, was admitted in evidence and marked Plaintiff's Exhibit No. 17, and read as follows:

**Plaintiffs' Exhibit No. 17—Letter, August 18, 1911,
Gregory to Washoe County Bank.**

“Aug. 18th, 1911.

Washoe County Bank,
Reno, Nevada.

Gentlemen:

Some time ago I was advised that you would notify me of the opinion which was to be rendered to you by Judge Cheney in regard to the transfer of stock from the name of H. M. Martin to Estate of W. O'H. Martin, Inc. Please advise me whether the opinion has been received, and if so, what your intention is in the matter.

Yours very truly,

T. T. C. GREGORY.”

(Witness is here shown a letter.)

I received this letter on the 24th of August, 1911.

WHEREUPON a letter from George H. Taylor, Assistant Cashier, to T. T. C. Gregory, was admitted in evidence and marked Plaintiffs' Exhibit No. 18, and read as follows:

**Plaintiffs' Exhibit No. 18—Letter, August 23, 1911,
Taylor to Gregory.**

“Reno, Nevada, August 23, 1911.

T. T. C. Gregory,
Attorney-at-Law,
San Francisco,
California,

Dear Sir:

Replying to your letter of the 18th inst., Judge

Cheney is away on his vacation. As soon as he returns, we will advise you of his opinion in the matter referred to.

Yours very truly,

“G. H. TAYLOR, A. Cas.”

(Witness is here shown a carbon copy of a letter.)

This is a carbon copy of a letter which I sent to them in the regular course of mail.

WHEREUPON a letter from T. T. C. Gregory to the Washoe County Bank was admitted in evidence and marked Plaintiff's Exhibit No. 19, and read as follows: [97]

Plaintiffs' Exhibit No. 19—Letter, September 20, 1911, Gregory to Washoe County Bank.

“September 20, 1911.

Washoe County Bank,

Reno, Nevada,

Dear Sirs:

Please advise me whether Judge Cheney has returned and has rendered an opinion to you regarding the transfer of Certificate of certain shares of stock from the name of H. W. Martin to Estate of W. O'H. Martin, Incorporated. You will recall that it was understood when I was in Reno at your directors' meeting that when information was received, it would be transferred to me.

Yours very truly.”

(Witness is here shown a letter.)

I received this letter on the 26th of September, 1911.

WHEREUPON a letter from George H. Taylor, Assistant Cashier, to T. T. C. Gregory, dated September 25th, 1911, was admitted in evidence and marked Plaintiff's Exhibit No. 20, and read as follows:

Plaintiffs' Exhibit No. 20—Letter, September 25, 1911, Taylor to Gregory.

“Reno, Nevada, Sept. 25th, 1911.

Mr. T. T. C. Gregory,
San Francisco,
California.

Dear Sir:

Replying to your letter of the 20th inst., under the facts as we understand them, we are advised that we should not transfer the stock standing in the name of H. M. Martin, while he is indebted to the Bank.

Yours very truly,

G. H. TAYLOR, A. Cas.”

Cross-examination.

I am one of the plaintiffs in this action and I verified the amended complaint. I have known Mr. Rowland since 1902, and when I stated in this complaint that he resided in Nevada, I believed that he was such resident, and had been for a number of years.

As to Mr. Bender's residence, I have understood that he had business in both California and Nevada, and I gather that he was a resident of Nevada because he was a director of the Washoe County [98] Bank, and that he is there frequently among people in Nevada.

Testimony of Mr. C. T. Bender, Recalled for Plaintiffs.

Direct Examination.

I am familiar with the dividends that have been declared upon the fifty (50) shares of stock of the Washoe County Bank standing in the name of H. M. Martin since July, 1911.

(It is here stipulated between counsel that the value of the stock in question at the time of filing the bill in the above-entitled cause was in excess of \$3,000.)

WITNESS.—(Continuing.) The following dividends were declared on the fifty (50) shares of stock in question:

Dividend No. 51—Jan. 13, 1913—5% or \$5 a share.

Dividend No. 52—Jul. 10, 1913—4% or \$4 a share.

Dividend No. —Jan. 15, 1914—4% or \$4 a share.

Dividend No. —Jul. 1914—4% or \$4 a share.

The market value of the stock of the Washoe County Bank in January, 1912 was \$150 a share.

Testimony of Harry M. Martin, Recalled for Plaintiffs.

Referring to Plaintiffs' Exhibit No. 12, consisting of three dividend checks endorsed by George H. Taylor, on all of which my name is signed by Mr. Taylor, together with the Estate of W. O'H. Martin, I never gave Mr. Taylor authority to so endorse those checks for me.

Referring to Plaintiff's Exhibits Nos. 3, 5, 6, which are checks endorsed by your mother alone,

(Testimony of Harry M. Martin.)

I never gave her any authority to endorse those checks.

Referring to Plaintiffs' Exhibit No. 4, which is endorsed "H. M. Martin, per Estate of W. O'H. Martin, Inc., Assignee" and "Fred Stadtmuller, Agent." I never gave Mr. Stadtmuller authority to endorse that check.

Testimony of C. L. Harwood, for Plaintiffs. [99]

C. L. HARWOOD, called as a witness on behalf of plaintiffs, being duly sworn testified as follows:

Direct Examination.

I am counsel for the Estate of W. O'H. Martin, Inc., and was such in the month of September, 1912. I recollect a meeting in that month at which Mrs. Wight and Mr. Partridge were present. I recollect a request made by Mrs. Wight and Mr. Partridge that the Estate of W. O'H. Martin, Inc., bring suit against the Washoe County Bank to compel the transfer of the stock in liquidation here. The result was a refusal to bring the suit. The reasons given by Mrs. Martin were her long association with the bank through her husband and herself. The fact of her having been a depositor in the bank for many years and her husband having been President of the Bank, and of the social relations that existed in Reno. I think also some mention was made of the fact that the State Court would probably be influenced by the Bank.

Cross-examination.

As far as I remember the meeting in question was

(Testimony of C. L. Harwood.)

not a formal meeting of the Board of Directors of the Martin Estate Company. The meeting followed a telephonic demand that the Martin Estate Company be dissolved and distribution of its assets made to its different members. The demand was signed jointly by Mrs. Wight and Mrs. Gregory.

(Plaintiffs rest.)

WHEREUPON the following proceedings took place.

“Mr. CHENEY.—If the Court please, the Martin Estate Company, the real party in interest here, has filed an answer and before we proceed we would like to know what proof they have in support of their answer.

Mr. HARWOOD.—If the Court please, the Martin Estate Company adopts the evidence so far offered in support of its answer.

Mr. CHENEY.—And rests upon that? [100]

Mr. HARWOOD.—And rests upon that, yes.

Mr. CHENEY.—Then, may it please the Court, on behalf of these defendants, except the Martin Estate Company, Incorporated, we move the Court that this suit be dismissed upon the ground that the Court has no jurisdiction, for the reason,

First, that it is now shown that this is a suit wholly between citizens of different states, and that all the parties upon each side of the controversy are citizens of different states, and that it is not shown that all of the defendants are citizens of different states from that of the plaintiffs:

Second, upon the ground that it is not sufficiently

(Testimony of C. T. Bender.)

shown that this is not a collusive suit, brought by these plaintiffs as nonresident stockholders, instead of being brought by the defendant, Martin Estate Company, the real *party interest*, for the purpose of conferring upon this court a jurisdiction which would not otherwise exist.

The COURT.—The motion will be overruled.”

WHEREUPON the attorneys for the defendants to maintain and prove the said issue on their part offered the following evidence, to wit:

Testimony of C. T. Bender, for Defendants.

C. T. BENDER, being called as a witness on behalf of the defendants, and having been duly sworn, testified as follows:

Direct Examination.

I am, and have been since 1880, the Cashier and Secretary of the Washoe County Bank, and a stockholder and director all such time.

(The attention of the witness is here directed to Minute-book of stockholders meetings of the Washoe County Bank.)

Referring to a proxy introduced in evidence, signed by Louise W. Martin for the Estate of W. O'H. Martin, appointing Fred Stadtmuller as proxy to represent that Estate for three hundred shares of the stock of the Bank at the meeting of July 11, 1911, the Minutes of that meeting show that the stockholders of the bank allowed Mr. Stadtmuller on motion to vote two hundred and fifty shares only.

D. A. Bender is my brother. His residence is in

(Testimony of C. T. Bender.)

Berkeley, California. At the time of the filing of the bill in this case on [101], January 13, 1913, he was not a citizen or resident of the State of Nevada.

H. M. Martin was appointed a director of the Washoe County Bank by the Board of Directors to fill the vacancy caused by the death of Mr. Lyman. (Witness is here shown the stock ledger of the Washoe County Bank.) This is the stock ledger of the Washoe County Bank kept in the usual course of business and showing the stockholders of the bank. I find by consulting the book that H. M. Martin was a stockholder of the bank on February 10, 1903. This Book further shows that on February 6th, he became a stockholder to the extent of fifty (50) shares represented by Certificate #171, dated February 9, 1903, the stock being still uncanceled and outstanding. The stock ledger also shows that the Estate of W. O'H. Martin prior to the 9th of February, 1903, owned three hundred (300) shares of the stock of the Washoe County Bank, represented by Certificate #106. The Estate of W. O'H. Martin owned no other shares except the shares represented by Certificate #106. (It is here admitted by counsel for the plaintiffs that upon the back of Certificate #106 under the printing thereon appears the name "Louise W. Martin" and "President" which was signed by Louise W. Martin.)

WHEREUPON Certificate #106 was read into the record as follows:

"Number 106. 300 shares. This certificate that

(Testimony of C. T. Bender.)

Estate W. O'H. Martin, Inc., of Reno, Nevada, is entitled to three hundred shares of the capital stock of the Washoe County Bank, of One Hundred Dollars each, transferable only on the books of the bank by endorsement and surrender of this certificate, after compliance with the conditions printed on its back. Reno, Nevada, July 10, 1902. C. T. Bender, Cashier. Geo. W. Mapes, President."

And in red ink across the face appears, "Cancelled February 9, 1903."

On the back of the certificate appears the following:

"No transfer of the stock described in this certificate will be made upon the books of the corporation until after the payment of all calls and assessments made or imposed thereon, and all indebtedness due to the banking corporation by the person in whose name the stock stands on the books of the corporation, except with the consent, in writing, of the president." And immediately under that writing appears "Louise W. Martin, President." [102]

This certificate No. 106 was cancelled, and two new certificates issued in lieu thereof. Certificate No. 170, dated February 9, 1903, for two hundred and fifty (250) shares was issued to the Estate of W. O'H. Martin, Inc. Certificate No. 171, same date, for fifty (50) shares was issued in favor of H. M. Martin.

During the month of February, 1903, the Estate of W. O'H. Martin was not represented in stock of the Washoe County Bank belonging to it in any

(Testimony of C. T. Bender.)

single certificate to the amount of fifty (50) shares. The entire holding of the Estate in stock of the Washoe County Bank was represented by a single certificate of three hundred (300) shares.

The words "Cancelled, February 9, 1903," in red ink on the front of Certificate No. 106 are in the handwriting of George H. Taylor, the Assistant Cashier of the Bank. (Witness here refers to the Minute-book of the Board of Directors of the Washoe County Bank.)

H. M. Martin was appointed a director at a meeting of the Board held on February 10, 1903, at which meeting there were present D. A. Bender, M. E. Ward, George W. Mapes, A. H. Manning, and F. M. Rowland. Absent, C. T. Bender. The records show that on the motion of A. H. Manning, seconded by F. M. Rowland, H. M. Martin was appointed a director of the Bank to fill the unexpired term of the late Mr. D. B. Lyman, and the secretary was instructed to notify him of said action. The minutes are signed by George H. Taylor, Assistant Secretary. (It was here stipulated that counsel for defendants might read into the record the official oath of H. M. Martin as a director of the Washoe County Bank, and it was further stipulated that the signature on the oath was the signature of H. M. Martin. The said oath read as follows:)

"Official Oath. State of Nevada, County of Washoe, ss. I, H. M. Martin, do solemnly swear that I will support and defend the constitution and government of the United [103]. States and

(Testimony of C. T. Bender.)

the constitution and government of the State of Nevada against all enemies, whether domestic or foreign; and that I will bear true faith and allegiance and loyalty to the same, any ordinance, resolution, or law of any State convention of any State or legislature to the contrary notwithstanding; and further that I do this with a full determination, pledge and purpose, without any mental reservation or evasion whatsoever. And I do further solemnly swear that I have not fought a duel, nor sent nor accepted a challenge to fight a duel, nor been a second to either party, or in any manner aided or assisted in such duel, nor been knowingly the bearer of such challenge or acceptance since the adoption of the constitution of the State of Nevada, and that I will not be so engaged or concerned, directly or indirectly, in or about any such duel during my continuance in office; and further that I will well and faithfully perform the duties of the office of director of the Washoe County Bank on which I am about to enter So Help me God. H. M. Martin. Subscribed and sworn to before me this 13th day of February, 1903, J. A. Bonham, County Clerk." Seal attached.

I first learned that it was suggested or intimated that H. M. Martin was not a true owner or genuine owner of the fifty (50) shares of stock of the Washoe County Bank in question during the year 1909. I heard this from Mrs. Martin.

(Witness here turns to the Minute-book of the stockholders meeting of the Washoe County Bank.) At the meeting dated July 14, 1903, H. M. Martin

(Testimony of C. T. Bender.)

was present and represented the fifty (50) shares of stock standing in his name on the books of the Washoe County Bank. H. M. Martin also represented the two hundred and fifty (250) shares of the Estate of W. O'H. Martin at that meeting. At that meeting the following directors were elected; George W. Mapes, D. A. Bender, F. M. Rowland, M. E. Ward, H. M. Martin, A. H. Manning and C. T. Bender, and it is admitted that they all took the oath of office as directors of the bank on that date.

It is also admitted by stipulation of counsel that on August 9th, 1904, Harry Martin represented fifty (50) shares for himself, and also as proxy for two hundred and fifty (250) shares of the Estate, and that he was again elected, and qualified as a director, and that he was present June 3, 1905, as a director at the meeting [104] of the Board of Directors for the last time. It is also admitted that at the meeting of the stockholders of July 11, 1905, H. M. Martin was not present, and his stock was represented by C. T. Bender, proxy. It is also admitted that on July 10, 1906, at a stockholders' meeting, C. T. Bender had a proxy for the H. M. Martin stock, and that the Estate stock was not represented. It is also admitted that on July 9, 1907, at a stockholders' meeting, the fifty (50) shares of stock of H. M. Martin were represented by Louise W. Martin, proxy, who also represented at that meeting the stock of the Martin Estate Company. It is also admitted that at the stockholders' meeting of July 14, 1908, the Martin Estate Company represented

(Testimony of C. T. Bender.)

two hundred and fifty (250) shares, the fifty (50) shares of H. M. Martin not being represented. It is also admitted that a stockholders' meeting dated July 12, 1910, the Martin Estate Company was represented by Mrs. Martin's two hundred and fifty (250) shares and the fifty (50) shares of H. M. Martin were represented by the Martin Estate, proxy.

H. M. Martin was a director of the bank from February 10, 1903, until about July 1st, 1905. I did not at any time while Mr. H. M. Martin was a director of the bank as a director, stockholder or officer of the bank have any intimation or knowledge whatever that H. M. Martin was not a genuine stockholder, owning stock in that bank. (Witness here refers to the Minute-book of the Directors of the Washoe County Bank.)

Referring to the record of the meeting of October 9, 1906, it shows an authorization of a loan of Fifteen Thousand dollars (\$15,000) to Harry Martin on October 9, 1906, by a Resolution of the Board of Directors. The part of the record material to this inquiry reads as follows:

“The application for loans and the loans made since last meeting of the board were approved as follows: [105]

H. M. Martin, \$15,000 at 7 per cent, secured by 479 shares of the Nye County Mercantile Company stock. On motion of D. A. Bender, seconded by A. M. Ward, the loan to Mr. Martin was granted.”

There were present at that directors' meeting, D. A. Bender, A. H. Manning, M. E. Ward, A. M. Ward

(Testimony of C. T. Bender.)

and F. E. Rowland. Absent George W. Mapes and C. T. Bender. At the present time D. A. Bender is paralyzed and confined to his bed.

I did not learn until a subsequent meeting of the loan to H. M. Martin. That was the meeting of November 13th, 1906. All the members of the Board were present. At that meeting or prior to the meeting I had no knowledge or information tending to show that H. M. Martin was not the owner of the fifty (50) shares of stock of the Washoe County Bank that stood in his name. (Witness' attention is here directed to the Minutes of the Stockholders' Meetings of the Washoe County Bank.)

At an adjourned meeting of the stockholders, August 10th, 1909, the number of the directors was increased from seven to nine. The following directors were elected: George W. Mapes, D. A. Bender, A. H. Manning, C. T. Bender, G. H. Taylor, F. M. Rowland, O. M. Ward, Fred Stadtmuller, Adolph Herz. Neither Fred Stadtmuller nor George H. Taylor had been directors of the Washoe County Bank prior to August 10, 1909, and they have both been directors ever since.

I remember a conversation with Mrs. Louise Martin in 1909, relative to the ownership of the fifty (50) shares of stock of the Washoe County Bank that stood in the name of H. M. Martin. My recollection is that she and Mr. Stadtmuller brought the fifty (50) shares of stock to me to be transferred, at which time I declined to transfer it. Mrs. Martin notified me that the stock belonged to the Mar-

(Testimony of C. T. Bender.)

tin Estate Company, was their stock and always had been. I declined to transfer it until the indebtedness of Mr. Harry Martin [106] was paid. Harry Martin was then and is now indebted to the bank in approximately \$20,000. Mrs. Martin did not use these words "Please do not send that check to Harry. You know the stock is ours," as far as I remember. I do not remember anything with reference to a dividend check of Harry M. Martin being said by Mrs. Martin when she was there at that time."

IT IS HERE ADMITTED BY COUNSEL that the by-law set out in the Answer of the Washoe County Bank herein was the duly adopted by-law of the Washoe County Bank at all times in controversy, and that the said by-law was upon the front and back of each certificate of stock of the Washoe County Bank.

I certainly never made any agreement or gave any assurance to anybody that Mr. Harry M. Martin should be a director of the bank without being a genuine owner of stock in the bank.

Cross-examination.

After having the conversation with Mrs. Martin in July, 1909, I did not take and proceedings to collect the debt from Harry Martin. Neither I, nor the bank have at any time taken any steps to collect the debt from Harry Martin, other than to send him notices asking him to pay. These notices were to pay both principal and interest and I suppose the first notices were six months after the date of

(Testimony of C. T. Bender.)

the note. We always send out notices in June and December for settlement.

When Harry Martin failed to pay either principal or interest, I took no steps by action at law, or otherwise, to collect the debt.

Q. You could have collected it if you had done so, couldn't you? A. I don't think so.

Q. Did you attempt to sell the stock which you held under pledge and collateral agreement, giving you the right to sell?

Mr. CHENEY.—I understand this all goes in subject to the objection? [107]

The COURT.—All subject to the objection, yes.

A. No, we didn't particularly, we never could find anybody that would buy it."

I did not attempt to sell the stock which the bank held under pledge and collateral agreement. We never offered the shares of stock of the Nye County Mercantile Company for sale. We never proceeded in accordance with the statute of the State of Nevada to sell that collateral. The original loan was for \$15,000. On January 5, 1909, Harry Martin gave a renewal note to cover the principal and interest then accrued. He never borrowed any money in addition to the \$15,000. (The attention of the witness is here called to the Minutes of the Board of Directors of October 9th, 1906.) A reference to the Minutes shows that at the time the loan of \$15,000 was granted Mr. Martin was already indebted to the bank for Twenty-two hundred and seventy-nine and 10/100 dollars (\$2279.10.) On

(Testimony of C. T. Bender.)

November 24th, 1906, he gave his note for Seventeen thousand, five hundred dollars (\$17,500), then in 1909 there was a renewal note for twenty thousand four hundred and fifty-one and 64/100 dollars (\$20,451.64).

After my conversation with Mrs. Martin in 1909 and up to the July dividend of 1911 I delivered the dividend checks on the fifty shares of stock in question to Mr. Stadtmuller, to mail to Harry M. Martin. Stadtmuller was Assistant Cashier at the time, and he disobeyed my directions in mailing the dividend checks to the Estate of W. O'H. Martin. I never saw these dividend checks which were endorsed by someone other than Harry Martin until after this suit was started. The reason why I continued to have Mr. Stadtmuller send dividend checks to Harry Martin, although he was indebted, was because it was our custom to send checks to stockholders. I stopped this custom however, in 1911. I cannot give any particular reason why I did not stop in 1909 and 1910. We have never made an effort [108] to foreclose the lien that the bank claims on these fifty (50) shares of stock. We did not feel that we could get service on Mr. Martin, although possibly we could have got service on him between 1906 and 1911. At the time the loan was made to Harry Martin, Mr. Taylor was Assistant Cashier of the Washoe County Bank. I think I learned of the application for a loan made by Harry M. Martin to Taylor about a month afterwards. At the time of the loan in question the duties of the Assist-

(Testimony of C. T. Bender.)

ant Cashier were the same as the duties of the Cashier. The cashier is an executive officer in a way of the bank. Mr. Taylor was not only Assistant Cashier but he was also Assistant Secretary and I was Secretary.

(The witness is here shown Certificate No. 171, Plaintiffs' Exhibit No. 2.)

The words "H. M. Martin" in the body of the certificate are in the handwriting of Mr. Taylor. The words "M. E. Ward" are in the handwriting of M. E. Ward, the Vice-president of the bank.

Testimony of George W. Mapes, for Defendants.

GEORGE W. MAPES, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

I am President and Director of the Washoe County Bank, and have been such since January, 1902. I have been a stockholder ever since the bank's organization. I remember the death of Mr. Lyman and the matter of the appointment by the directors of his successor.

I had a conversation with Mrs. Martin as to the Martin Estate, obtaining a representation on the Board of Directors. I cannot state the exact date. The substance of the conversation was as follows: Mrs. Martin wanted to be represented in the Washoe County Bank. She wanted her son to become a director, and I stated to Mrs. Martin that no one could be a director of the Washoe County Bank without he owned stock in his own name. Mrs. Martin stated to me that she would let him have stock, or

(Testimony of George W. Mapes.)

give him stock, I would not say which. Mrs. [109] Martin stated that she had talked with several of the directors and they seemed to be willing to have her son become a director. She did not tell me who particularly. If I recollect, I think she mentioned some of the directors that she had had a talk with. I certainly believed that while Mr. Harry Martin was a director of the bank that he owned the shares of stock that were in his name. I would not have consented to his being a director if I had not so believed. I did not learn that anybody claimed the ownership in this stock other than Harry Martin until several years after he was elected a director. At the time of the loan to Harry Martin, in the fall of 1906, I had no intimation, knowledge or suggestion that Harry Martin was not the true owner of the fifty (50) shares of stock that stood in his name.

Testimony of F. M. Rowland, for Defendants.

F. M. ROWLAND, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination.

I live in Lassen County, California, and have lived there ever since 1854. I have never been a citizen or resident of the State of Nevada. I am a stockholder in the Washoe County Bank, and have been such for more than twelve years. I was appointed a director after Mr. Martin died, and have been such ever since. I remember the death of Mr. Lyman and the appointment of Mr. Harry Martin as his successor. I do not remember any conversation

(Testimony of F. M. Rowland.)

with Mrs. Martin about Harry Martin being appointed in Mr. Lyman's place. I do not remember a conversation in which Mrs. Martin suggested that Mr. Harry Martin be a director, and I replied that I was very fond of Harry, but I can say it now. At the time of Harry Martin's appointment on the Board of Directors I had no knowledge or intimation that he was not the owner of fifty (50) shares of stock that stood in his name on the books of the bank. [110] I had no such knowledge or information during any time that Harry Martin served as a director.

At the time of the loan I had no such knowledge. I had no idea but what he owned the stock. I would not at any time have consented to anybody being a director of the Washoe County Bank unless he was a genuine owner of the stock. The first time that I remember hearing that Harry Martin was not the true owner was when Harry Martin appeared before the Board of Directors in July, 1911. Until Mr. Gregory made his appearance I did not know that Mr. Harry Martin had endorsed the certificate for fifty (50) shares back to the Martin Estate.

Testimony of C. T. Bender, Recalled for Defendants.

I think that the first time that I heard the claim that Harry Martin had endorsed the fifty (50) shares of stock that stood in his name back to the Martin Estate was in July, 1911.

Testimony of George Mapes, Recalled for Defendants.

I did not learn that the certificate for fifty (50) shares of stock standing in the name of Harry Martin had been endorsed to the Martin Estate until I came to court. I first learned of a claim to this effect when Mr. Gregory met me in the Washoe County Bank and requested me to put it up to the directors.

I have been President ever since the fifty (50) shares of stock in question stood on the books of the Washoe County Bank in the name of Harry Martin. Neither as President of the bank nor in any other capacity did I ever consent that Mr. Martin could transfer this stock without the payment of his indebtedness to the bank.

Cross-examination.

After it was called to my attention that the fifty (50) shares of stock in question had been transferred back to Harry Martin in the presence of our Assistant Cashier, Mr. Taylor, I had a talk with him about it.

It is the custom of our Cashiers to report a matter of that [111] kind to the Board of Directors.

Mr. PARTRIDGE.—(Q.) Now, Mr. Mapes, when you are about to make a loan, or when a loan is asked for, is it the custom for the cashiers to report to the board all that they know about the person applying for the loan? A. To the president.

Q. No, for the cashiers.

A. To report to who?

(Testimony of George W. Mapes.)

Q. To report to the board all they know about the position, standing, and so forth, of the person applying for a loan?

A. It is customary, yes, sir—to report all the transactions of the bank to the board?

Q. Yes, sir. A. Yes.

The COURT.—Now, that answer was that it was customary to report all the transactions of the bank to the board of directors?

A. Yes, sir. I could explain that perhaps more definite if they would allow me to.

Mr. DOWNER.—All right. Proceed.

A. We have a loan committee; the directors of the Washoe County Bank is a committee; the majority rules; the cashiers are instructed to make a certain loan, but not to exceed a certain amount; and it had generally been the custom for people making an application for a loan to have them make a statement of the conditions of the individual or corporation: then it is usually acted on by the board, and whoever that report was handed to—that might be handed to me or the cashier, or some of the members of the bank—employees—but it is always generally acted on by the board.

Mr. PARTRIDGE.—(Q.) When collateral is tendered as security, who investigates the collateral—whose duty is it in the bank to investigate the collateral?

A. The whole board, or the majority of the board.

[112]

The COURT.—Give that answer again, please.

(Testimony of George W. Mapes.)

A. The committee.

The duties of the cashier in general terms, and in a few words are: That they are to make small loans and look after the interest of the bank. Now, I don't want to be misconstrued with any question I answered. The cashiers nor the president alone has a right to make very large loans in the Washoe County Bank but they do make them with the committee, or the majority of the committee, which is the directors of the bank, and a majority rules.

Defendants close.

And this concluded the testimony in the case.

The foregoing is presented as a statement of the evidence taken at the trial of said cause.

(Copy) JOHN S. PARTRIDGE,
Attorney for Plaintiffs.

Service of the above statement of the evidence is acknowledged and copy received this 14th day of Nov. 1917, and we hereby consent that the same may be settled as the Statement of Evidence as of this date.

(Copy) HARWOOD & SPRINGMYER,
COLE L. HARWOOD,
Attorneys for Defendant, Estate of W. O'H. Martin,
Incorporated. [113]

Stipulation Re Statement of Evidence.

IT IS HEREBY STIPULATED AND AGREED that the foregoing constitutes all the testimony taken in the above-entitled matter and is correct

and that the same may be settled, certified and approved by the Judge of the above-entitled court.

CHENEY, DOWNER, PRICE & HAWKINS.

Order Settling and Approving Statement of Evidence.

I, E. S. Farrington, the Judge who tried the above-entitled cause, do hereby certify that the foregoing Statement of the Evidence is correct and that the same is hereby settled and approved.

Dated Dec. 3rd, 1917.

E. S. FARRINGTON,
Judge of the District Court.

[Indorsed]: No. 1636. In the District Court of the United States in and for the District of Nevada. Clara M. Wight and Otis B. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, Estate of W. O'H. Martin, Inc., et al., Defendants. Statement of the Evidence. Filed December 7, 1917. F. J. Edwards, Clerk. Mastick & Partridge, Attorneys at Law, Foxcroft Building, 68 Post Street, San Francisco. [114]

*In the District Court of the United States, in and for
the District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, et al.,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, et al.,
Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court.

You will please incorporate in the transcript on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, the following additional portions of the record, to wit:

Defendants' motion to dismiss amended bill of complaint, and Opinion of Court on motion to dismiss amended bill of complaint.

CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Defendants, Except Estate of W. O'H.
Martin, Incorporated.

Service of the above and foregoing praecipum acknowledged and copy received this 28th day of September, 1917.

Attorneys for Plaintiffs and Appellants.

COLE L. HARWOOD,

Attorney for Estate of W. O'H. Martin, Inc.

[Indorsed]: No. 1636. In the District Court of the United States for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, et al., Defendants. Praeceptum for Transcript of Record. Filed this 29th day of Sept., 1917. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for Certain Defendants. [115]

*In the United States District Court, in and for the
District of Nevada, Ninth Judicial Circuit.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY,
and T. T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, ES-
TATE OF W. O'H. MARTIN, INCORPO-
RATED, a Corporation, GEORGE M.
MAPES, O. W. WARD, F. M. ROWLAND,
C. T. BENDER, FRED STADTMULLER,
RUDOLPH HERZ, GEORGE H. TAYLOR,
A. H. MANNING and D. A. BENDER,
Defendants.

Motion to Dismiss an Amended Bill of Complaint.

Now come all the above-named defendants, except the Estate of W. O'H. Martin, Incorporated, a corporation, by their solicitors, and move the above-named court to dismiss the amended bill of complaint in the above-entitled action, upon the following grounds:

1. That the facts stated in said bill are insufficient to constitute a valid cause of action in equity against these defendants.

2. That said amended bill is insufficient in that it does not give the Christian names of the plaintiff T. T. C. Gregory, or of the defendants O. W. Ward,

F. M. Rowland, C. T. Bender, A. H. Manning and D. A. Bender.

3. That it appears upon the face of said amended bill that said plaintiffs' alleged cause of action arises from, and is the consequence of an illegal transaction between the Estate of W. O'H. Martin, Incorporated, and the Washoe County Bank, and that plaintiff does not come into a Court of Equity with clean hands.

CHENEY, DOWNER, PRICE & HAWKINS,
A. E. CHENEY,

Solicitors for said Defendants.

[Indorsed]: No. 1636. In the District Court of the United States for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation, et al., Defendants. Motion to Dismiss Amended Bill of Complaint. Filed this 27th day of May, 1913. T. J. Edwards, Clerk. Cheney, Downer, Price & Hawkins, Reno, Nevada, Attorneys for said Defendants. [116]

*In the District Court of the United States, in and for
the District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY,
and T. T. C. WIGHT, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, ES-
TATE OF W. O'H. MARTIN, INCORPO-

RATED, a Corporation, GEORGE M. MAPES, O. W. WARD, F. M. ROWLAND, C. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,
Defendants.

Opinion on Motion to Dismiss Amended Bill of Complaint.

MASTICK & PARTRIDGE, for Plaintiffs.

CHENEY, DOWNER, PRICE & HAWKINS, for Defendants.

FARRINGTON, District Judge.

In the year 1902, the defendant, the Estate of W. O'H. Martin, Incorporated, caused to be transferred on the books of the Washoe County Bank fifty shares of its stock into the name of Harry M Martin, for the sole purpose of qualifying him to act as a director of the bank. When the certificate was so issued Mr. Martin, although he re-transferred it to the Estate of W. O'H. Martin, Incorporated, became, and continued to act as, a director of said bank until some time in the year 1905. This was all fully understood by the bank. The stock still stands on the books of the bank in the name of Harry M. Martin. Until the year 1911, the bank continued to pay all dividends on the fifty shares of stock to the said estate. During that year—the date is not precisely fixed—the bank for the first time claimed that the Martin Estate was not the owner of the stock in question, and refused to pay the latter any dividends thereon. The dividends declared since

such refusal amount to \$850.00. Subsequent to the refusal, the estate presented to the bank the certificate, duly endorsed by Harry M. Martin, and demanded that it immediately transfer said fifty shares on its books into the name of said Estate of W. O'H. Martin, Incorporated, and issued a new certificate therefor. This also the bank refused to do. Suit [117] was brought January 13, 1913, by complainants Clara M. Wight and Gertrude M. Gregory, as owners of two hundred shares each of the capital stock of defendant estate, praying that the bank and its officers, be compelled and directed by decree of this court, to transfer the said fifty shares of stock on the books of the bank, and issue a certificate or certificates therefor to said Estate of W. O'H. Martin, Incorporated, and also to pay to the latter all dividends accrued or to accrue thereon. Otis B. Wight is joined as the husband of Clara M. Wight, and T. T. C. Gregory, as the husband of Gertrude M. Gregory.

The suit is now before the Court on the motion of all the defendants, except the Estate of W. O'H. Martin, Incorporated, to dismiss the bill of complaint, on the ground "that it appears upon the face of said amended bill that said plaintiffs' alleged cause of action arises from, and is the consequence of an illegal transaction between the Estate of W. O'H. Martin, Incorporated, and the Washoe County Bank, and that plaintiff does not come into a court of equity with clean hands."

The alleged illegality is in this, that Harry M. Martin acted as a director of the bank, and it was

the intention and understanding both of the bank and of the estate, that he should so act while he was neither the owner nor the holder of the stock in question, and the stock was allowed to remain in his name on the books of the bank for that purpose.

The Nevada statute, under which the bank was operating in 1902 (Rev. Laws of Nevada, sec. 1223), provided that the "powers of the corporation shall be exercised by a board of not less than three trustees, who shall be stockholders in the company."

In *State vs. Leete*, 16 Nev. 242, it was held that a person who holds stock issued to him, and standing on the books of the corporation in his name, is eligible to be a director, although he may not in fact be the owner of the stock.

In *Orr Water Ditch Company vs. Reno Water Company*, 17 Nev. 166, 170, the stockholders of the Reno Water Company, including the directors, sold all their stock to one George B. Hill. The directors did not resign at the time of the sale, and a few months later met and allowed an account against the [118] company to the amount of \$1,138.65, in favor of the Orr Water Ditch Company. It was held that when the trustees sold and delivered their stock to Hill, they ceased to be trustees of the Water Company, because they were no longer stockholders in the corporation.

It would seem, therefore, that when Harry M. Martin retransferred the fifty shares of stock to the Estate of W. O'H. Martin, Incorporated, he was no longer a stockholder in the bank, and *ipso facto*, ceased to be a director thereof; nevertheless, he

continued to act as such until some time in 1905. This *clearly illegal*, and any understanding or agreement that he should so act was also illegal. Such an act or understanding, however, cannot be characterized as immoral or criminal; it is merely illegal.

It is well settled that a court of equity will not lend its aid to enforce an illegal agreement, or to assist a wrongdoer in obtaining the fruits of an illegal act. However, it will not decline to enforce and protect rights, in so far as they are not based upon or supported by that which is illegal.

In the present case the right to have the stock transferred on the books of the bank, and other certificates issued in lieu thereof, in the name of the estate, does not rest on an illegal transaction. Complainants do not require the aid of the illegal contract to establish their right. Their action is in no sense an affirmation of the contract.

1 Page on Contracts, sec. 527.

No part of the profit or advantage arising therefrom is asked for. The transaction alleged to be illegal has been completed and closed for more than eight years, and will not be affected in any manner by what the Court is now asked to do. The estate owned the stock long prior to the transfer to Martin, and still owns it. It is the owner and in possession of the stock certificate. The certificate, properly endorsed and assigned to the estate, was duly presented to the bank, with a demand that new certificates be issued therefor.

The right to a transfer on the books of the company depends on its by-laws and on the statutes

which fix and determine the conditions upon which such [119] transfers may be had. These terms are usually set out in the stock certificate itself, and constitute a contract between the corporation and the holders of its stock. Complainants' right here are based upon that contract, and in order to maintain and support them, it is not necessary to resort to the illegal transaction and agreement set out in the bill.

Evans v. Dravo, 62 Am. Dec. 359, 362;

Wright v. Pipe Line Co., 47 Am. Rep. 701;

Allebach v. Godshalk, 9 Atl. 444;

Irvin v. Irvin, 29 L. R. A. 292;

Robson v. Hamilton, 69 Pac. 651;

Primeau v. Granfield, 180 Fed. 847;

9 Cyc. 556;

1 Page on Contracts, sec. 527.

The motion is overruled. Defendants will be allowed twenty days within which to answer or otherwise plead, as they may elect.

[Indorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation et al., Defendants. Opinion on Motion to Dismiss Amended Bill of Complaint. Filed February 24th, 1914. T. J. Edwards, Clerk.

[120]

*In the District Court of the United States for the
District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, et al.,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, et al.,
Defendants.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing one hundred and twenty (120) typewritten pages, numbered from 1 to 120, inclusive, to be a full, true and correct copy of the record and of all proceedings in said cause and court, and that the same, together with the original Citation on Appeal and stipulations and orders extending time to file record, hereto annexed, constitute the return to the Citation on Appeal.

I do hereby certify that the cost of the foregoing record is \$67.95, and that the same has been paid by the plaintiffs herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Carson City, Nevada, this 12th day of December, 1917.

[Seal]

T. J. EDWARDS,

Clerk. [121]

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY
and T. C. GREGORY, Her Husband,
Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation, Es-
tate of W. O'H. MARTIN, Incorporated, a
Corporation, GEORGE W. MAPES, O. W.
WARD, F. M. ROWLAND, C. T. BEN-
DER, FRED STADTMULLER, RUDOLPH
HERZ, GEORGE H. TAYLOR, A. H. MAN-
NING and D. A. BENDER,
Defendants.

Citation on Appeal.

United States of America,—ss.

The President of the United States to Washoe
County Bank, a Corporation, Estate of W. O'H.
Martin, Incorporated, a Corporation, George M.
Mapes, O. W. Ward, F. M. Rowland, C. T. Ben-
der, Fred Stadtmuller, Rudolph Herz, George
H. Taylor, A. H. Manning and D. A. Bender,
GREETINGS:

You are hereby admonished to be and appear at
the United States Circuit Court of Appeals for the
Ninth Circuit, to be held at the City of San Fran-
cisco, in the State of California, within thirty (30)
days from the date hereof, pursuant to an order al-

lowing an appeal, filed and entered in the Clerk's Office of the District Court of the United States for the District of Nevada, upon a final decree signed, filed and entered on the 19th day of June, 1917, in that said suit being in equity No. 1636, wherein you are the defendants and appellees, and Clara M. Wight and Otis B. Wight, her husband, and Gertrude M. Gregory and T. T. C. Gregory, her husband, are plaintiffs and appellants, to show cause, if any there be, why the decree rendered against the said appellants, as in said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, Honorable E. S. FARRINGTON,
United States District Judge for the District of Nevada, this 10th day of August, 1917.

E. S. FARRINGTON,
United States District Judge.

Due service of the within Citation on Appeal and receipt of a true copy thereof this 15th day of August, 1917, is hereby admitted.

COLE L. HARWOOD,
Atty. for Estate of W. O'H. Martin, Incorporated.

Receipt of a true copy of the within this 15th day of August, 1917, is hereby admitted.

CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Washoe County Bank and Certain
Other Defendants.

[Endorsed]: No. 1636. In the District Court of the United States, in and for the District of Nevada. Clara M. Wight and Otis B. Wight et al., Plaintiffs,

vs. Washoe County Bank, a Corporation, Estate of W. O'H. Martin, Inc. et al., Defendants. Citation on Appeal. Filed August 16th, 1917. T. J. Edwards, Clerk. By H. O. Edwards, Deputy.

**Stipulation Re Extension of Time for Filing
Amendment to Plaintiffs' Statement of
Evidence.**

[TELEGRAM.]

312SFEF 20 Collect

MX San Francisco, Calif. 222 P Sep 27 1917

Cheney Downing Price and Hawkins. 166

Reno Nev.

Re Wight versus Washoe will grant extension for filing amendments to Monday October fifteenth Please advise clerk of extension.

ALAN C. VAN FLEET.

Agreed to:

COLE L. HARWOOD,

Solicitor for Estate of W. O'H. Martin, Inc.

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1636.

CLARA M. WIGHT and OTIS B. WRIGHT, Her
Husband et al.,

Plaintiffs,

vs.

WASHOE COUNTY BANK, a Corporation et al.,
Defendants.

Order Extending Time to and Including October 15, 1917, to File Amendment to Plaintiffs' Statement of Evidence.

By consent of county, and good cause appearing therefor, IT IS ORDERED that the time for the defendants, other than the Estate of W. O'H. Martin, Incorporated, a corporation, to propose and file amendments to the plaintiffs' statement of evidence in the above-entitled action, be and the same hereby is extended to and including Monday, October 15, 1917.

Dated: Carson City, September 29th, 1917.

E. S. FARRINGTON,

District Judge.

[Endorsed]: No. 1636. In the District Court of the United States for the District of Nevada. Clara M. Wight et al., Plaintiffs, vs. Washoe County Bank, a Corporation et al., Defendants. Order Extending Time. Filed this 29th day of Sept., 1917. T. J. Edwards, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY
and T. T. C. GREGORY, Her Husband,
Plaintiffs and Appellants,

vs.

WASHOE COUNTY BANK, a Corporation, Es-
tate of W. O'H. MARTIN, Incorporated, a

Corporation, GEORGE W. MAPES, O. W. WARD, F. M. ROWLAND, O. T. BENDER, FRED STADTMULLER, RUDOLPH HERZ, GEORGE H. TAYLOR, A. H. MANNING and D. A. BENDER,

Defendants and Appellees.

Stipulation Enlarging Time to and Including December 20, 1917, to File Record and Docket Cause in Appellate Court.

It is stipulated and agreed by and between plaintiffs and appellants and defendants and appellees, that the plaintiffs and appellants herein may have to and including Thursday, the 20th day of December, 1917, within which to file the record on appeal in the above-entitled cause, and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

JOHN S. PARTRIDGE,

Attorneys for Plaintiffs and Appellants.

COLE L. HARWOOD,

Attorneys for Defendant and Appellee, Estate of W. O'H. Martin, Incorporated.

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Defendants and Appellees Other Than Estate of W. O'H. Martin, Inc.

Order of Enlargement.

Upon reading the above stipulation, and good cause appearing therefor, it is hereby ordered that plaintiffs and appellants in the above-entitled cause may have to and including Thursday, December 20,

within which to file their record on appeal herein, and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

District Judge.

[Endorsed]: No. 1636. In the United States Circuit Court of Appeals for the Ninth Circuit. Clara M. Wight et al. vs. Washoe County Bank et al. Stipulation and Order of Enlargement. Filed Nov. 21st, 1917. T. J. Edwards, Clerk U. S. Dist. Court Dist. Nevada.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY
and T. T. C. GREGORY, Her Husband,
Plaintiffs and Appellants,
vs.

WASHOE COUNTY BANK, a Corporation, Es-
tate of W. O'H. MARTIN, Incorporated, a
Corporation, GEORGE M. MAPLES, O. W.
WARD, F. M. ROWLAND, O. T. BEN-
DER, FRED STADTMULLER, RUDOLPH
HERZ, GEORGE H. TAYLOR, A. H. MAN-
NING and D. A. BENDER,
Defendants and Appellees.

Stipulation and Order Enlarging Time to and Including November 20, 1917, to File Record and Docket Cause in Appellate Court.

It is stipulated and agreed by and between plaintiffs and appellants and defendants and appellees, that the plaintiffs and appellants herein may have to and including Tuesday, the 20th day of November, 1917, within which to file the record on appeal in the above-entitled cause, and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

JOHN S. PARTRIDGE,

Attorney for Plaintiffs and Appellants.

COLE L. HARWOOD,

Attorney for Defendant and Appellee, Estate of W. O'H. Martin, Incorporated.

CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Defendants and Appellees Other Than Estate of W. O'H. Martin, Inc.

Order of Enlargement.

Upon reading the above Stipulation, and good cause appearing therefor, it is hereby ordered that Plaintiffs and Appellants in the above-entitled cause may have to and including Tuesday, November 20, 1917, within which to file their record on appeal herein, and docket the case with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

E. S. FARRINGTON,

District Judge.

[Endorsed]: No. 1636. In the United States Circuit Court of Appeals for the Ninth Circuit. Clara M. Wight et al., Plaintiffs and Appellants, vs. Washoe County Bank et al., Defendants and Appellees. Stipulation and Order of Enlargement. Filed Nov. 1st, 1917. T. J. Edwards, Clerk.

[Endorsed]: No. 3091. United States Circuit Court of Appeals for the Ninth Circuit. Clara M. Wight and Otis B. Wight, Her Husband, and Gertrude M. Gregory and T. T. C. Gregory, Her Husband, Appellants, vs. Washoe County Bank, a Corporation, Estate of W. O'H. Martin, Incorporated, a Corporation, George M. Mapes, O. W. Ward, F. M. Rowland, C. T. Bender, Fred Stadtmuller, Rudolph Herz, George H. Taylor, A. H. Manning and D. A. Bender, Appellees. Transcript of the Record. Upon Appeal from the United States District Court for the District of Nevada.

Filed December 14, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY
and T. T. C. GREGORY, Her Husband,
Plaintiffs and Appellants,
vs.

WASHOE COUNTY BANK, a Corporation, ES-
TATE OF W. O'H. MARTIN, INCORPO-
RATED, a Corporation, GEORGE M.
MAPES, O. W. WARD, F. M. ROWLAND,
C. T. BENDER, FRED STADTMULLER,
RUDOLPH HERZ, GEORGE H. TAYLOR,
A. H. MANNING and D. A. BENDER,
Defendants and Appellees.

**Order Enlarging Time to and Including October 1,
1917, to File Record and Docket Cause in Appel-
late Court.**

Good cause appearing therefor, it is hereby or-
dered that plaintiffs and appellants in the above-
entitled cause may have to and including Monday,
October 1st, within which to file their record on ap-
peal herein, and docket the case with the clerk of the
United States Circuit Court of Appeals for the
Ninth Circuit.

E. S. FARRINGTON,
District Judge.

Dated: Aug. 31, 1917.

[Endorsed]: In the United States Circuit Court of
Appeals for the Ninth Circuit. Clara M. Wight et

al., Plaintiffs and Appellants, vs. Washoe County Bank, a Corporation, et al., Defendants and Appellees. Order of Enlargement. Filed Sep. 4, 1917. F. D. Monckton, Clerk. Refiled Dec. 14, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

CLARA M. WIGHT and OTIS B. WIGHT, Her
Husband, and GERTRUDE M. GREGORY
and T. T. C. GREGORY, Her Husband,
Plaintiffs and Appellants,
vs.

WASHOE COUNTY BANK, a Corporation, ES-
TATE OF W. O'H. MARTIN, INCORPO-
RATED, a Corporation, GEORGE M.
MAPES, O. W. WARD, F. M. ROWLAND,
C. T. BENDER, FRED STADTMULLER,
RUDOLPH HERZ, GEORGE H. TAYLOR,
A. H. MANNING and D. A. BENDER,
Defendants and Appellees.

**Order Enlarging Time to and Including November
1, 1917, to File Record and Docket Cause in
Appellate Court.**

Good cause appearing therefor, it is hereby ordered that plaintiffs and appellants in the above-entitled cause may have to and including Thursday, November 1st, 1917, within which to file their record on appeal herein, and docket the case with the clerk

of the United States Circuit Court of Appeals for the Ninth Circuit.

E. S. FARRINGTON,
District Judge.

Dated: Sept. 15th, 1917.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Clara M. Wight et al., Plaintiffs and Appellants, vs. Washoe County Bank, a Corporation, et al., Defendants and Appellees. Order Under Rule 16 Enlarging Time to Nov. 1, 1917, to File Record thereof and to Docket Case. Filed Sep. 19, 1917. F. D. Monckton, Clerk. Refiled Dec. 14, 1917. F. D. Monckton, Clerk.

[TELEGRAM.]

RECEIVED AT 722 MARKET ST., SAN FRANCISCO.

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SAN FRANCISCO CALIF

PROCURE FURTHER TIME TO FILE
WIGHT CASE STATEMENT NOT SETTLED
JUDGE ABSENT

T. G. EDWARDS.

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[TELEGRAM.]

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STATEMENT NOT SIGNED JUDGE FAR-
RINGTON IS IN CALIFORNIA

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*In the United States Circuit Court of Appeals in
and for the Ninth District.*

CLARA M. WIGHT et al.,

Plaintiffs and Appellants,

vs.

WASHOE COUNTY BANK, a Corporation, et al.,
Defendants and Appellees.

**Order Enlarging Time to and Including December
20, 1917, to File Record and Docket Cause in
Appellate Court.**

GOOD CAUSE APPEARING THEREFOR, IT
IS HEREBY ORDERED that the plaintiffs and ap-
pellants may have to and including the 20th day of
December, 1917, to file the record on appeal and
docket the said cause with the Clerk of the above-
entitled court.

WM. W. MORROW,

Judge.

Dated: November 20, 1917. San Francisco, Cal.

[Endorsed]: In the United States Circuit Court of Appeals, Ninth District. Clara M. Wight et al., Plaintiffs and Appellants, vs. Washoe County Bank, a Corporation et al., Defendants and Appellees. Order of Enlargement. Filed Nov. 19, 1917. F. D. Monckton, Clerk. Refiled Dec. 14, 1917. F. D. Monckton, Clerk.

No. 3091. United States Circuit Court of Appeals for the Ninth Circuit. Orders Under Rule 16 Enlarging Time to and Including Dec. 20, 1917, to File Record thereof and to Docket Case. Refiled Dec. 14, 1917. F. D. Monckton, Clerk.

